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Supreme Court, U.S.
FILED
No. 10-____ 10-294 AUG 26 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

IN RE: NED COMER; BRENDA COMER; ERIC HAYGOOD; BRENDA HAYGOOD; LARRY HUNTER; SANDRA L. HUNTER; MITCHELL KISIELWESKI; JOHANNA KISIELWESKI; ELLIOTT ROUMAIN; ROSEMARY ROUMAIN; JUDY OLSON AND DAVID LAIN,

Petitioners.

On Petition For A Writ Of Mandamus To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF MANDAMUS

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QUESTIONS PRESENTED FOR REVIEW

Where the litigants have perfected a right to an appeal under 28 U.S.C. § 1291, does the Circuit Court have a duty to render a decision?

When an en banc court loses its quorum after granting rehearing but before hearing argument en banc, can the remaining judges dismiss an appeal of right without a decision on the merits?

When an en banc court loses its quorum before deciding an appeal on rehearing en banc, does the original panel maintain control over the case?

STATEMENT OF INTERESTED PARTIES

Petitioners

Ned Comer; Brenda Comer; Eric Haygood; Brenda Haygood; Larry Hunter; Sandra L. Hunter; Mitchell Kisielweski; Johanna Kisielweski; Elliott Roumain; Rosemary Roumain; Judy Olson and David Lain.

Respondent

United States Court of Appeals for the Fifth Circuit
Honorable Edith H. Jones, Chief Judge
Lyle W. Cayce, Clerk
600 S. Maestri Place
New Orleans, LA 70130-3408
(504) 310-7700

Defendants/Appellees in *Comer v. Murphy Oil USA*

Murphy Oil USA; Universal Oil Products (UOP); Honeywell International Inc.; Shell Oil Company; ExxonMobil Corporation; AES Corp.; Alliance Resource Partners LP; Alpha Natural Resources Inc.; Arch Coal Inc.; Foundation Coal Holdings Inc.; Massey Energy Co.; Natural Resource Partners LP; Peabody Energy Corp.; Westmoreland Coal Co.; International Coal Group Inc.; Consol Energy Inc.; BP America Production Company; BP Products North America Inc.; Cinergy Corp.; Duke Energy Corp.; Reliant Energy Inc.; Allegheny Energy Inc.; ConocoPhillips Company; EON AG; The Dow Chemical Company; E.I. DuPont De Nemours & Co.; Entergy Corp.; FirstEnergy Corp.; FPL Group Inc.; Tennessee Valley Authority; Xcel Energy Inc.; Chevron USA Inc.; The American Petroleum Institute.

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CITATIONS FOR CASE IN OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS

Original Docketed Case:

Comer v. Nationwide Mut. Ins., 2006 WL 1066645 (S.D.Miss. Feb. 23, 2006) (NO. 1:05-CV-436 LTS-RHW)

Comer v. Murphy Oil USA, Inc., 2007 WL 6942285 (S.D.Miss. Aug. 30, 2007) (NO. 1:05-CV-436 LG-RHW)

Reversed by

Comer v. Murphy Oil USA, 585 F.3d 855, 69 ERC 1513 (5th Cir. (Miss.) Oct. 16, 2009) (NO. 07-60756)

Rehearing en Banc Granted by

Comer v. Murphy Oil USA, 598 F.3d 208 (5th Cir. (Miss.) Feb. 26, 2010) (NO. 07-60756)

On Rehearing en Banc

Comer v. Murphy Oil USA, 607 F.3d 1049, 70 ERC 1808 (5th Cir. (Miss.) May 28, 2010) (NO. 07-60756)

Appeal Dismissed by

Comer v. Murphy Oil USA, 607 F.3d 1049, 70 ERC 1808 (5th Cir. (Miss.) May 28, 2010) (NO. 07-60756)

STATEMENT OF JURISDICTION

This Court has jurisdiction under U.S. CONST. art. III, § 2 and 28 U.S.C. § 1651(a) to issue a Writ of Mandamus directing the United States Court of Appeals for the Fifth Circuit to decide the appeal that was dismissed without a decision on May 28, 2010.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. V:

> . . . nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. § 46:

> **Assignment of judges; panels; hearings; quorum:**
>
> **(a)** Circuit judges shall sit on the court and its panels in such order and at such times as the court directs.
>
> **(b)** In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability

of a judge of the court because of illness. Such panels shall sit at the times and places and hear the cases and controversies assigned as the court directs. The United States Court of Appeals for the Federal Circuit shall determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard and, notwithstanding the first sentence of this subsection, may determine by rule the number of judges, not less than three, who constitute a panel.

(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court en banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court en banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an en banc court reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was

heard or reheard by the court en banc at a time when such judge was in regular active service.

(d) A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.

28 U.S.C. § 1291:

Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

5th Cir. R. 41.3:

41.3 Effect of Granting Rehearing En Banc. Unless otherwise expressly provided, the granting of a rehearing en banc vacates the panel opinion and judgment of the court and stays the mandate.

Fed. R. App. P. 47:

Local Rules by Courts of Appeals

(a) Local Rules.

(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with – but not duplicative of – Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(b) Procedure When There Is No Controlling Law.

> A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

STATEMENT OF THE CASE

Petitioners have a statutory and constitutional right to have their appeal decided. Petitioners Ned Comer, et al. respectfully request that this Court issue a writ of mandamus directing the United States Court of Appeals for the Fifth Circuit to reinstate Petitioners' appeal and return it to the panel for final adjudication, so that Petitioners' rights may be honored. Such extraordinary relief is warranted by the extraordinary nature of this case.

Petitioners filed this climate change lawsuit against various coal, oil and energy companies seeking monetary compensation for damages they sustained. The district court dismissed the lawsuit, based on a flawed standing and political question

doctrine analysis, thereby closing the courthouse doors to these private litigants.

Petitioners timely appealed the dismissal to the United States Fifth Circuit Court of Appeals. There, a properly-constituted, three-judge panel heard argument and reversed the district court. The Defendants applied for rehearing en banc. Seven of the sixteen Fifth Circuit judges recused themselves, leaving nine active judges (the minimum to constitute an en banc quorum) to consider and vote on the application for rehearing en banc. Six of the nine voted to grant rehearing en banc. The court issued a supplemental briefing schedule and set the case for oral argument en banc. After briefing was complete but before the case was argued, another judge recused herself causing the court to lose its en banc quorum.

The clerk asked the parties to submit letter briefs stating their respective positions on what authority the Fifth Circuit had to act absent an en banc quorum. The parties filed their briefs setting forth their positions and offering alternative solutions. Then five of the remaining eight non-recused judges (less than one-third of the active judges of the Fifth Circuit) took the extraordinary action of dismissing the appeal, refusing to allow the original panel to act and leaving Petitioners with no decision on the appeal and no recourse. Can a United States Circuit Court of Appeals shirk its responsibility to adjudicate a matter properly before it and within its jurisdiction?

As this Court has long recognized, it is the Judiciary's duty to say what the law is.[1] In response to a five-judge order dismissing the appeal in *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010), Petitioners ask this Court to direct the Fifth Circuit to reinstate the appeal and render a decision. This Court, since its inception, has acknowledged the fundamental principle at stake here:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury . . . '[I]t is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and that every injury its proper redress.' The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[2]

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[1] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174-78 (1803); *Cohens v. Virginia*, 19 U.S. 264, 404 (1821).

[2] *Marbury v. Madison*, 5 U.S. at 163 (quoting William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND Vol. 3 at 109 (Oxford 1765-1769)).

PROCEDURAL BACKGROUND: A PROPERLY CONSTITUTED PANEL RENDERED A DECISION REVERSING THE DISTRICT COURT. THEN A NINE-JUDGE EN BANC COURT GRANTED REHEARING BUT SUBSEQUENTLY LOST ITS QUORUM BEFORE THE CASE WAS RE-ARGUED.

After five years, this case has only one final decision – the district court judgment dismissing the case on political question and standing grounds. This case's history is summarized as follows:

09/20/2005	Petitioners filed their lawsuit.
08/30/2007	The district court dismissed *Comer* for lack of standing and as non-justiciable.[3]
09/17/2007	The Petitioners timely appealed the dismissal.[4]
01/25/2008	The parties timely filed their briefs.[5]
08/06/2008	A panel was formed but one member was unable to participate, so the parties presented oral arguments to two panel members.[6]

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[3] Rec. Doc. 369, *Comer v. Murphy*, No. 1:05-cv-00436-LG-RHW (S.D.Miss. filed Aug. 30, 2007).

[4] Rec. Doc. 370, *Comer v. Murphy*, No. 1:05-cv-00436-LG-RHW (S.D.Miss. filed Sept. 17, 2007).

[5] Docket, *Comer v. Murphy*, No. 07-60756 (5th Cir. filed Jan. 25, 2008) (briefing complete).

[6] Docket, *Comer*, No. 07-60756 (5th Cir. filed Aug. 6, 2008) (oral argument heard).

08/21/2008	A panel member was disqualified, so a new panel was formed and oral arguments were rescheduled.[7]
11/03/2008	The parties presented oral arguments to three panel members.[8]
10/16/2009	The Fifth Circuit panel issued a 36-page decision reversing the district court's dismissal.[9]
11/27/2009	The appellees petitioned for rehearing en banc.[10]
12/14/2009	The Fifth Circuit ordered the appellants to respond to the application,[11] and the appellants complied.[12]
02/26/2010	Seven Circuit judges recused; six of the remaining nine judges voted to rehear the case en banc.[13]

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[7] Docket, *Comer*, No. 07-60756 (5th Cir. filed Aug. 21, 2008) (calendared case continued).

[8] Docket, *Comer*, No. 07-60756 (5th Cir. filed Nov. 3, 2008) (oral argument heard).

[9] *Comer*, 585 F.3d 855 (5th Cir. 2009).

[10] Pet. by Appellees, *Comer*, No. 07-60756 (5th Cir. filed Nov. 27, 2009).

[11] Resp. Requested, *Comer*, No. 07-60756 (5th Cir. filed Dec. 2, 2009).

[12] Resp./Opp'n, *Comer*, No. 07-60756 (5th Cir. filed Dec. 14, 2009).

[13] Ct. Order, *Comer*, No. 07-60756, 598 F.3d 208 (5th Cir. filed Feb. 26, 2010) (granting petition for rehearing en banc); Ct. Order, *Comer*, No. 07-60756, 607 F.3d 1049 (5th Cir. filed May 28, 2010) ("Five Judge Order") App. at 6-7 (Davis, J. dissenting).

03/31/2010 The appellants filed a rehearing brief as ordered.[14]

04/06/2010 – 05/07/2010
Various amici filed briefs.

04/30/2010 The Fifth Circuit Clerk of Court issued a notice that an additional judge had recused herself, and the court had lost its quorum.[15]

05/06/2010 The Fifth Circuit Clerk requested the parties write letter briefs advising of the law in this situation.[16]

05/12/2010 The parties submitted their original letter briefs on the quorum issue.[17]

05/17/2010 The parties submitted their reply letter briefs.[18]

05/28/2010 Five judges issued an order *sua sponte* dismissing the appeal, with the panel members dissenting.[19]

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[14] Appellants Supplement Br., *Comer v. Murphy*, No. 07-60756 (5th Cir. filed Mar. 31, 2010).

[15] Docket, *Comer*, No. 07-60756 (5th Cir. filed Apr. 30, 2010) (en banc court has lost its quorum; calendared case continued).

[16] Letter of Advisement, *Comer*, No. 07-60756 (5th Cir. filed May 6, 2010) (requesting supplemental letter briefs).

[17] Letter by Appellants, *Comer*, No. 07-60756 (5th Cir. filed May 12, 2010); Letter by Appellee Shell Oil Co., *Comer*, No. 07-60756 (5th Cir. filed May 12, 2010).

[18] Letter by Appellee Shell Oil Co., *Comer v. Murphy*, No. 07-60756 (5th Cir. filed May 17, 2010); Letter by Appellants, *Comer*, No. 07-60756 (5th Cir. filed May 17, 2010).

After this case spent two and a half years at the Fifth Circuit, and after eight of the sixteen active circuit judges recused themselves, five non-recused judges decided *sua sponte* that, although they lacked any authority to act, they had authority to dismiss the entire appeal. The judges reasoned that "[t]he absence of a quorum . . . does not preclude the internal authority of the body to state the facts as they exist in relation to that body, and to apply the established rules to those facts."[20] They determined that the en banc court could not act, the properly constituted three-judge panel lacked the power to do anything further, and the panel opinion was vacated by a local rule. In so doing, they allowed the local rule to override the Petitioners' statutory right to appeal, and created a legal vacuum by permanently vacating the panel's decision.

The result is nothing short of a travesty. The district court's single-judge ruling stands, despite three Fifth Circuit judges reversing it, while six Fifth Circuit judges thought the issues were important enough to rehear the appeal en banc. This result is additionally bizarre because the district court judge had expressly told the litigants, when ruling from the bench, that the Fifth Circuit would be the appropriate

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[19] Five Judge Order at App. 1-32.

[20] Five Judge Order at App. 3.

body to review his ruling and that he would abide by the Fifth Circuit's opinion.[21]

After both the parties and the judiciary expended considerable time and resources – initial briefing, two panel arguments, briefing to the en banc court for rehearing, and briefing letters to the Clerk of Court on the quorum issue – the case has reverted to the district court's judgment.[22] There is no court of appeals decision addressing that judgment.

When the circuit court (although professedly lacking power to act at all) dismissed the case, the litigants were left without an adjudication of their appeal though they had followed all the applicable rules. This startling result occurred even though a three-judge panel – the only circuit judges to have spoken on the district court's judgment – had unanimously voted to overturn the district court's ruling. Under federal statutory requirements as well as due process and equal protection considerations, the Fifth Circuit should have reinstated the panel decision rather than dismiss the appeal.

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[21] *Comer*, No. 1:05-cv-00436-LG-RHW (S.D.Miss. Aug. 30, 2007).

[22] Judgment, Rec. Doc. 369, *Comer*, No. 1:05-cv-00436-LG-RHW (S.D.Miss. filed Aug. 30, 2007).

ARGUMENT

I. CIRCUIT COURTS HAVE A DUTY TO DECIDE APPEALS WITHIN THEIR JURISDICTION.

What unfolded was an egregious breakdown of regular procedure and fundamental fairness.

A. The Fifth Circuit had jurisdiction over the Petitioners' appeal.

Federal courts have an absolute duty to exercise jurisdiction once it has been conferred:

> "It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we

> cannot avoid them. All we can do is to exercise our best judgment and conscientiously to perform our duty."[23]

Congress conferred an appeal of right to litigants who, like Petitioners here, are the subject of adverse final decisions in the district courts.[24] Circuit courts are bound by statute and by the Due Process Clause to accord appellate rights Congress has conferred, as it has here. Under the U.S. Constitution,[25] litigants have a right to an appeal.

Here, the litigants followed the procedural rules, including the Rules of Appellate Procedure and the Local Rules. The five judges who dismissed the case never suggested that the Fifth Circuit lacked jurisdiction nor that there was some rule or law requiring dismissal.[26] Rather, the judges *sua sponte* determined that the court lacked authority to act, disregarding Petitioners' due process right to a decision of their properly filed and diligently prosecuted appeal.

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[23] *Cohens v. Virginia*, 19 U.S. 264, 404 (1821); *see also New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 358 (1989); *United States v. Will*, 449 U.S. 200, 213-16 (1980).

[24] *See* 28 U.S.C. § 1291; Fed. R. App. P. 3, 4.

[25] U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

[26] Five Judge Order at App. 6.

B. The litigants have been treated unequally under the law.

All United States citizens are entitled to equal protection under the law.[27] Granting appellate review to some but arbitrarily denying it to others in the same situation violates equal protection principles.[28]

Fifth Circuit Local Rule 41.3, which automatically vacates the panel decisions when the en banc court grants rehearing, does not have an equivalent counterpart in most circuits.[29] Petitioners had their appeal dismissed because they filed their lawsuit in a circuit whose local rule vacates panel decisions upon granting an en banc rehearing, regardless of whether or not the en banc court ever intended to reverse the panel decision. If Petitioners had filed an identical suit in another circuit, the panel decision would not have been vacated. Faced with the effect of its Local Rule 41.3, the five judges felt that the best solution

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[27] U.S. CONST. amends. V & XIV, § 1; *Bolling v. Sharpe*, 347 U.S. 497 (1954) (applying the Fourteenth Amendment's Equal Protection principles to the federal government through the Fifth Amendment).

[28] *Griffin v. Illinois*, 351 U.S. 12, 37 (1956); *Lindsey v. Normet*, 405 U.S. 56, 77 (1972).

[29] Four U.S. Circuit Courts of Appeals have rules that automatically vacate the panel decision when rehearing is granted. 4th Cir. R. 35(c); 5th Cir. R. 41.3; 6th Cir. R. 35(a); 11th Cir. R. 35-11. Eight Circuit Courts do not. *See* Local R. for the 1st, 2nd, 3rd, 7th, 8th, 9th, D.C. and Fed. Cirs. Alternatively, the Tenth Circuit vacates the judgment but not the decision. 10th Cir. R. 35.6

was to just dismiss the entire appeal and revert to the district court decision, even though Federal Rule of Appellate Procedure 2 allows circuit courts to suspend their local rules "for good cause" (unless that suspension would extend the time to appeal).[30] Local Rule 41.3's operation and the five judges' dismissal arbitrarily denied these litigants their appeal, thereby violating equal protection of the laws afforded by the Constitution.

C. The en banc court lacked a quorum, and therefore lacked the authority to act. Thus the *sua sponte* dismissal is void.

The five judge order states that the judges did not have authority to act, but they acted anyway. Because the Order dismissing the appeal was issued by a five-judge group without authority to conduct judicial business, it is void.[31] The dismissal order shows this contradiction on its face:

> "Upon this recusal, this en banc court lost its quorum. Absent a quorum, no court is authorized to transact judicial business. *See Nguyen v. United States*, 539 U.S. 69, 82 n.14 (2003) (quoting *Tobin v. Ramey*, 206 F.2d 505, 507 (5th Cir. 1953)).

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[30] Fed. R. App. P. 2, 26(b).

[31] *Pennoyer v. Neff*, 95 U.S. 714, 728 (1877); *Dynes v. Hoover*, 61 U.S. 65, 66 (1857).

> The absence of a quorum, however, does not preclude the internal authority of the body to state the facts as they exist in relation to that body, and to apply the established rules to those facts.
>
> In arriving at our decision, directing the clerk to dismiss this appeal, this en banc court has considered and rejected each of the following options: . . . ."[32]

But a circuit court's "internal authority" is insufficient to apply law to facts, and issue orders or render decisions. Applying law to the facts is exactly what courts need jurisdiction and authority to do.[33] Furthermore, it is the courts' duty to determine how to weigh and apply conflicting laws:

> "It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each. So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must

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[32] Five Judge Order at App. 6.

[33] *See, e.g., Jacobellis v. State of Ohio*, 378 U.S. 184, 189 (1964); *Ex Parte State of Oklahoma*, 220 U.S. 210, 212 (1911).

> determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."[34]

Federal judges can issue orders only when they have jurisdiction, and circuit court judges in particular can issue orders only through a properly constituted quorum of either a panel or an en banc court.[35] If the Fifth Circuit lacked an en banc quorum, then the five judge ad hoc group could not *sua sponte* issue dismissal orders. The en banc court either had authority to act or it did not. If it had authority to apply fact to law, it was obligated to decide the appeal. If it did not have such authority, it was barred from applying any law to any facts. It could not have it both ways.

Furthermore, the five judges did not merely apply "established rules" to the facts. They made specific and controversial interpretations of various legal arguments, over the panel members' objections. Because the Petitioners had a statutory right to an appeal, and the Fifth Circuit had a constitutional duty to decide that appeal, the very worst option was the one the five judges chose: dismissing the entire appeal, abrogating the court's judicial duty, and directing the litigants to appeal to this Court.

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[34] *Marbury v. Madison*, 5 U.S. at 174-78.

[35] With limited exceptions not relevant here, *see* Fed. R. App. P. 27(c).

i. The Rules of Appellate Procedure and Local Rules do not authorize dismissal when the Circuit Court fails to establish an en banc quorum.

The Rules of Appellate Procedure allow the courts to dismiss appeals for certain listed reasons,[36] but those do not apply here. The litigants did everything they were supposed to do: they drafted their pleadings according to the guidelines, followed the court's orders, filed their pleadings on time, and paid their fees. No one has suggested that any litigant took any action that justifies dismissing this appeal. There is no Rule of Appellate Procedure, Local Rule, or Internal Operating Procedure supporting the decision to dismiss the appeal just because an en banc rehearing could not be completed.

ii. There is no right to an en banc rehearing.

The five judges assumed that once the en banc court granted rehearing, the Fifth Circuit was powerless unless it could continue and complete the en banc rehearing process. There is no rule or law giving a litigant any right to an en banc rehearing, even after one tentatively has been granted. En banc rehearing is disfavored.[37] While on average U.S. circuit courts

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[36] Fed. R. App. P. 3 & 4.

[37] Fed. R. App. P. 35(a).

render 27,000 panel decisions each year, en banc courts decide only 75 cases annually.[38] The litigants were never vested with a substantive right to an en banc rehearing, and the five judges erred by dismissing the entire appeal when they learned they could not complete the en banc process.

iii. There is no rule or law that stripped the panel of its authority to act.

The five judges also assumed that once the en banc court voted to grant rehearing, the panel lost authority to act. But the opinion cited no rule to support the assumption that the panel lost that authority.[39] Fifth Circuit Local Rule 41.3 automatically vacates a panel decision when an en banc rehearing is granted, but never mentions whether or not the panel loses its authority to take necessary action. The panel could have continued to exert the authority it had never lost, and could have reheard the case based on the new briefing, issuing a new decision or reinstating its previous decision. The five judges' drastic action, taken *sua sponte* and without authority, was unnecessary, because the Fifth Circuit still could act through the properly constituted three-judge panel.

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[38] Michael E. Solimine, *Due Process and En Banc Decisionmaking*, 48 ARIZ. L. REV. 325, 325 (2006).

[39] Five Judge Order at App. 2-6.

II. A WRIT OF MANDAMUS IS THE PROPER REMEDY IN THIS CASE.

The public needs the circuit courts to function. There should be no set of circumstances under which a circuit court is so flummoxed that it cannot consider a case over which it has jurisdiction. Local rules and recusal standards simply cannot be applied in a way that disables a court of appeals or allows it to be easily manipulated. Fortunately, this Court can provide the Fifth Circuit with a roadmap to fulfill its duty. A writ of mandamus is appropriate because adequate relief cannot be obtained by another means, the circumstances are extraordinary, and the parties are entitled to the relief sought:[40]

> "It is a writ of most extensively remedial nature, and issues in all cases where the party has a right to have any thing done, and has no other means of compelling its performance."[41]

A. This Court's mandamus power is the only proper remedy.

The five judges' statement that "[t]he parties, of course, now have the right to petition the Supreme

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[40] Sup. Ct. R. 20(1), 20(3); *Cheney v. U.S. District Court,* 542 U.S. 367, 380-81 (2004); *see also In re Volkswagen of America, Inc.,* 545 F.3d 304, 310-11 (5th Cir. 2008) (en banc).

[41] *Marbury v. Madison*, 5 U.S. at 147 (quoting William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND Vol. 3 at 110 (Oxford 1765-1769)).

Court of the United States,"[42] implies that the parties have a functional remedy if the Fifth Circuit's decision is incorrect. But this Court does not sit as a first-instance court of appeals, and instead hears only narrowly circumscribed categories of cases – categories that do not include cases for which the court of appeals did not reach a decision.[43] The circuit courts must perform the work they were created to do, and this Court has the authority to make sure that the circuit courts function:

> "The second section of the third article of the constitution gives this court appellate jurisdiction in all cases in law and equity arising under the constitution and laws of the United States (except the cases in which it has original jurisdiction) with such exceptions, and under such regulations, as congress shall make. The term 'appellate jurisdiction' is to be taken in its largest sense, and implies in its nature the right of superintending the inferior tribunals."[44]

The most proper use of this Court's writ of mandamus authority is "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to *compel it to exercise its authority when it has a duty to*

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[42] Five Judge Order at App. 6.

[43] *See* Sup. Ct. R. 10.

[44] *Marbury v. Madison*, 5 U.S. at 147.

do so."[45] In this case, the five judge dismissal represents both an overreaching and a failure to exercise jurisdiction: the five judges had no authority to "[apply] the rules to the facts" and then dismiss this case, nor could the Fifth Circuit ignore the Petitioners' statutory right to an appeal and fail to do its judicial duty to adjudicate an appeal of right within its jurisdiction. Furthermore, mandamus is appropriate if the Petitioners are owed a nondiscretionary duty.[46] Here, the circuit court had a nondiscretionary duty to decide the Petitioners' appeal.

Additionally, judicial recusals caused the Fifth Circuit to lose its quorum. Recusals are a particularly proper issue for mandamus consideration, and the Fifth Circuit itself has repeatedly found that mandamus is appropriate to remedy an improper 28 U.S.C. § 455 recusal decision.[47] And every other federal circuit also uses mandamus to correct improper recusal

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[45] *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943) (emphasis added); *see also Cheney*, 542 U.S. at 380-81; *Will v. United States*, 389 U.S. 90, 95 (1967); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953); *Marbury v. Madison*, 5 U.S. at 148.

[46] *Cheney*, 542 U.S. at 381 & 392 (citing *Heckler v. Ringer*, 466 U.S. 602, 616 (1984)).

[47] *In re Faulkner*, 856 F.2d 716, 721 (5th Cir. 1988) (granting mandamus based on § 455(a) and § 455(b)(I)); *see also Davis v. Bd. of Sch. Comm'rs*, 517 F.2d 1044, 1051-52 (5th Cir. 1975) (explaining that 28 U.S.C. § 455 "is self-enforcing on the part of the judge" and that it may be enforced, *inter alia*, "by mandamus"); *Parrish v. Bd. of Comm'rs*, 524 F.2d 98, 102 & n.8 (5th Cir. 1975) (en banc) (quoting *Davis*).

the political question doctrine bar access to a judicial decision when the subject matter involves climate change? Because this case is being carefully watched by legal scholars, the public, and the media worldwide, it is important that federal courts maintain their high standards for fairness.

Furthermore, this case is unprecedented: the Petitioners could find no similar instance where a court of appeals utterly refused to hear an appeal of right. Under these extraordinary circumstances, mandamus is appropriate to correct the Fifth Circuit's erroneous *Comer* dismissal.

C. The parties have a clear and indisputable right to have the Fifth Circuit's abuse of discretion corrected.

A "clear and indisputable right" to mandamus arises from a "clear abuse of discretion":[51]

> "[A writ of mandamus] is said to be a writ of discretion. But the discretion of a court always means a found, legal discretion, not an arbitrary will. If the applicant makes out a proper case, the courts are bound to grant it. They can refuse justice to no man."[52]

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[51] *Volkswagen,* 545 F.3d at 311; *Cheney,* 542 U.S. at 380-81 (2004); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953).

[52] *Marbury v. Madison*, 5 U.S. at 153.

The five judges below abused their discretion by acting without authority, and by denying the Petitioners their clear and indisputable right to an appeal of the adverse district court judgment.

Courts have no discretion to disregard the law.[53] A court abuses its discretion when it reaches an "erroneous legal conclusion" that causes a "patently erroneous" result.[54] The five judges not only had no authority to dismiss this case, but they also misinterpreted the law in *sua sponte* doing so. Thus, the Petitioners have a clear and indisputable right to mandamus in order to correct the bizarre and unconstitutional result below.

III. THE FIFTH CIRCUIT HAS AN OBLIGATION TO REINSTATE AND DECIDE THE PETITIONERS' APPEAL.

The Fifth Circuit had several options for resolving its quorum issue. But five judges chose the least appropriate: throwing up their hands and completely dismissing the appeal. Although the parties disagreed on the best solution, any of the other options would have been less egregious.

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[53] *Volkswagen,* 545 F.3d at 310 ("As a general matter, a court's exercise of its discretion is not unbounded; that is, a court must exercise its discretion within the bounds set by relevant statutes and relevant, binding precedents.").

[54] *Volkswagen,* 545 F.3d at 310-11; *In re Ford Motor Co.,* 591 F.3d 406, 415 (5th Cir. 2009). *See generally, Cheney,* 542 U.S. 367.

A. The Fifth Circuit should have vacated the order granting rehearing en banc.

Under the Fifth Circuit Internal Operating Procedures, the panel retained authority to act after the petition for rehearing en banc was filed:

> *Petition For Rehearing En Banc – Handling Of Petition By The Judges*
>
> *Panel Has Control* – Although each panel judge and every active judge receives a copy of the petition for rehearing en banc, the filing of a petition for rehearing en banc does not take the case out of the control of the panel deciding the case. A Petition for rehearing en banc is treated as a petition for rehearing by the panel if no petition is filed. The panel may grant rehearing without action by the full court.[55]

Local Rule 41.3 automatically vacated the opinion but did not divest the panel of authority to act:

> **41.3 Effect of Granting Rehearing En Banc.** Unless otherwise expressly provided, the granting of a rehearing en banc vacates the panel opinion and judgment of the court and stays the mandate.

In fact, no Federal Circuit Court has a rule that withdraws the panel's authority during the en banc

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[55] Rules and Internal Operating Procedures of the United States Court of Appeals for the Fifth Circuit at 35 (2009) (available at http://www.ca5.uscourts.gov/clerk/docs/5thCir-IOP.pdf).

rehearing process. The five judges who applied "established rules to [the] facts," stripped the panel of its ability to act, but cited no law or rule to support that action.[56] Furthermore, if they had the authority to dismiss the entire appeal, then they should have had the authority to vacate the order granting en banc rehearing.

The five judges erred when they stripped the panel of its authority to act and dismissed the appeal. This Court should instruct the Fifth Circuit to vacate the order granting rehearing en banc, at which point the three-member panel could exert the control it never actually lost. The panel may then issue a new decision based on the additional briefing that the parties and the *amici* filed, or reinstate its previous decision.

B. Procedural Local Rule 41.3 cannot operate to permanently vacate a panel decision on an appeal of right.

Ironically the five judges found that they lacked the power to suspend a local procedural rule, yet had sufficient power to dismiss the Petitioners' statutory right to appeal, thereby preventing the Fifth Circuit from fulfilling its judicial duty. If the five judges had the authority to "apply the established rules to [the] facts,"[57] they should also have applied the

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[56] Five Judge Order at App. 6.

[57] Five Judge Order at App. 3.

longstanding precept that a local procedural rule cannot trump a constitutional right or a federal statute.[58]

When the Fifth Circuit granted en banc rehearing, it did not expressly vacate the panel decision in its Order. Rather, when the order granting the discretionary en banc rehearing was entered, Local Rule 41.3 by its own operation automatically "vacate[d] the panel opinion and judgment of the court." But the local rules should affect procedure, not substantive rights. Under Fed. R. App. P. 47, local rules must be consistent with Acts of Congress and the rules adopted under 28 U.S.C. § 2072. Because the en banc court cannot now replace the panel decision with a valid en banc decision, Rule 41.3 has effectively invalidated the appellants' right to appeal the district court's final decision. Therefore, Local Rule 41.3 is not consistent with the U.S. Constitution, 28 U.S.C. § 1291, and Fed. R. App. P. 3-4.

Under normal circumstances, the automatic-vacating rule ensures that the en banc court takes the proper procedural posture, so that everyone is on notice of the opinion's procedural and precedential status and so that the en banc court does not act as an appellate court over one if its own panels.[59] But this unique situation exposes the inherent risk in Local Rule 41.3: for the time between the grant of rehearing and a final en banc decision, the case has

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[58] Fed. R. App. P. 47; *Marbury v. Madison*, 5 U.S. at 178.

[59] Five Judge Order at App. 7 (Davis, J. dissenting).

no valid Fifth Circuit decision even though a panel has ruled. During this time, the procedural Rule 41.3 can impact substantive rights by reverting the case's outcome to the district court's decision. Under normal circumstances, this error is harmless once the en banc court enters a decision on the appeal. But here, because the en banc court could not proceed, the error is grave.

Under Fed. R. App. P. 47, Local Rule 41.3 should not overrule a substantive right to appeal and is invalid. The panel decision should still stand. In the alternative, Fed. R. App. P. 2 allows Courts to suspend local rules, and the Fifth Circuit should use this power to suspend Local Rule 41.3 and reinstate the panel's decision.

C. The Fifth Circuit could have placed the case on a special docket until a vacancy could be filled.

When the five judges were drafting the decision, there was one vacancy at the Fifth Circuit. The parties briefed the possible solution of placing the case on a special docket to wait until a new judge could be confirmed, but the panel rejected this option:

> "It is purely speculative as to when the current vacancy on this court will be filled and it is, of course, unknown whether that judge may also be recused. Furthermore, we have no way of knowing when another sitting judge in regular active service of the Court may become "undisqualified" or indeed

> whether another judge of this en banc court may become disqualified to sit further. The Wright and Miller treatise has observed:
>
> 'Any decision of this character, however, should be made *as promptly as possible*; delay that spans several months and the addition of new judges, and that creates at least the appearance of a decision that could not have been reached earlier, *should be avoided at all costs*.'
>
> 16AA WRIGHT & MILLER § 3981.3, at 448 (2008) (emphasis added)."[60]

But Wright and Miller do not advocate dismissing the case rather than waiting for another judge to join the court. The treatise advises making a decision as quickly as possible; it does not recommend that if a decision cannot be made quickly, the court should just give up and toss the case altogether. The majority raised valid concerns – particularly the concern that a new judge might also be disqualified. After this decision was filed, however, the President nominated a judge to fill the Fifth Circuit vacancy.[61] It is not unreasonable to wait until a new judge is confirmed

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[60] Five Judge Order at App. 5.

[61] *See* Office of the Press Secretary, The White House, *President Obama Names James E. Graves, Jr. to U.S. Court of Appeals* (for immediate release June 10, 2010), http://www.whitehouse.gov/the-press-office/president-obama-names-james-e-graves-jr-us-court-appeals (last visited 19 August 2010).

to see if the en banc court can then act; it is a better option than denying the parties' rights completely.

D. The Fifth Circuit does not need to rely on other suggested options.

The Fifth Circuit may have asked the Chief Justice to appoint a judge from another circuit to temporarily sit on the Fifth Circuit to reconstitute a quorum, but this option apparently violates separation of powers. Functionally, the temporary judge would be filling a vacancy by judicial appointment, rather than by presidential appointment with the advice and consent of the senate.[62] This option also violates the purpose of the en banc rehearing, which is for all of the judges in that circuit to come to a decision on what the law is *in that circuit*. Circuit court judges do not operate in a vacuum, but rather engage in sometimes complicated and ongoing discussions in order to reach a consensus.[63] It would not be appropriate for a judge from another circuit to join the en banc court and help decide what the law will be in the Fifth Circuit.

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[62] U.S. CONST. art. II, § 2.

[63] Michael E. Solimine, *Due Process and En Banc Decision-making*, 48 ARIZ. L. REV. 325 (2006); Maxwell L. Stearns, *Appellate Courts Inside and Out*, 101 MICH. L. REV. 1764 (2003); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003); Bernard E. Nodzon, Jr., *A Closer Look Inside Appellate Courts*, 29 WM. MITCHELL L. REV. 729 (2002).

Yet another suggestion was that the Fifth Circuit should transplant language from Federal Rule of Appellate Procedure 35 into the 28 U.S.C. § 46 quorum requirement. This would redefine a quorum as a "majority of judges *not disqualified*," rather than a majority of judges in regular active service. Under this novel interpretation of "quorum," one member of the court, if she were the only member not disqualified, would be empowered to issue an en banc decision on behalf of the Fifth Circuit. A decision issued under such an interpretation would lack any judicial authority.[64] The five judges properly rejected this option:

> **Declaring that there is a quorum under the provisions of Federal Rule of Appellate Procedure 35(a).** We believe that a quorum is properly defined under 28 U.S.C. § 46 as constituting a majority of the judges of the entire court who are in regular active service, and not as a body of the non-recused judges of the court, however few.[65]

The quorum requirement should not be read in a way that allows only a minority of active judges to participate in an en banc rehearing.

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[64] Jonathan Remy Nash, *The Majority That Wasn't: Stare Decisis, Majority Rule, and the Mischief of Quorum Requirements*, 58 EMORY L.J. 831 (2009).

[65] Five Judge Order at App. 3-4.

It was also suggested that the Fifth Circuit ignore the recusals under the rule of necessity. Our current recusal laws are strict in order to prevent both impropriety and the appearance of impropriety.[66] But courts cannot ignore the importance of retaining the highest possible level of judicial impartiality.[67] By federal statute, a judge who knows he "has a financial interest in the subject matter in controversy or in a party to the proceeding" is disqualified.[68] The statute is mandatory. According to its plain language, a judge who possesses such a financial interest "shall disqualify himself."[69]

Under the rule of necessity, a court of last resort may need to decide an issue even though the judges have a pecuniary interest in the outcome.[70] But the rule of necessity should only apply where courts have a duty to render a decision, not to discretionary en banc rehearings.[71] The Fifth Circuit may now have an en banc quorum given the recent judicial appointment; regardless, it already has a properly constituted three-judge panel that has jurisdiction and can render a decision. It makes no sense to apply the rule of necessity to force an unnecessary en banc

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[66] *See* 28 U.S.C. § 455.

[67] *See Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

[68] 28 U.S.C. § 455.

[69] *Id.*

[70] *See United States v. Will*, 449 U.S. 200, 211-216 (1980).

[71] *Id.*

rehearing, especially if that requires allowing recused judges to rejoin the en banc court and participate in a decision that may affect their financial interests.

IV. THIS COURT SHOULD ISSUE A WRIT OF MANDAMUS DIRECTING THE FIFTH CIRCUIT, IF IT STILL LACKS AN EN BANC QUORUM, TO REINSTATE THE APPEAL AND RETURN IT TO THE PANEL.

Because the petitioners have a statutory and constitutional right to have their appeal heard, they ask this Court to order the U.S. Court of Appeals for the Fifth Circuit to reinstate their appeal, so that their right may be honored. If the Fifth Circuit still lacks a quorum to rehear the case en banc, the petitioners ask this Court to order the Fifth Circuit to vacate the order granting rehearing en banc and return the case to the three-judge panel to decide the appeal.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-60756

NED COMER; BRENDA COMER; ERIC HAYGOOD, husband of Brenda Haygood; BRENDA HAYGOOD; LARRY HUNTER, husband of Sandra L. Hunter; SANDRA L. HUNTER; MITCHELL KISIELWESKI, husband of Johanna Kisielweski; JOHANNA KISIELWESKI; ELLIOTT ROUMAIN, husband of Rosemary Roumain; ROSEMARY ROUMAIN; JUDY OLSON; DAVID LAIN,

Plaintiffs-Appellants,

v.

MURPHY OIL USA; UNIVERSAL OIL PRODUCTS (UOP); SHELL OIL COMPANY; EXXONMOBIL CORP.; AES CORP.; ALLEGHENY ENERGY, INC.; ALLIANCE RESOURCE PARTNERS LP; ALPHA NATURAL RESOURCES, INC.; ARCH COAL, INC.; BP AMERICA PRODUCTION COMPANY; BP PRODUCTS NORTH AMERICA, INC.; CINERGY CORP.; CONOCOPHILLIPS COMPANY; CONSOL. ENERGY, INC.; THE DOW CHEMICAL COMPANY; DUKE ENERGY CORP.; EON AG; E.I. DUPONT DE NEMOURS & CO.; ENTERGY CORP.; FIRSTENERGY CORP.; FOUNDATION COAL HOLDINGS, INC.; FPL GROUP, INC.; HONEYWELL INTERNATIONAL, INC.; INTERNATIONAL COAL GROUP, INC.; MASSEY ENERGY CO.; NATURAL RESOURCE PARTNERS LP; PEABODY ENERGY

CORP.; RELIANT ENERGY, INC.; TENNESSEE VALLEY AUTHORITY; WESTMORELAND COAL CO.; XCEL ENERGY, INC.; CHEVRON USA, INC.; THE AMERICAN PETROLEUM INSTITUTE,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi

(Filed May 28, 2010)

Before JOLLY, Acting Chief Judge, and DAVIS, SMITH, STEWART, DENNIS, CLEMENT, PRADO and OWEN, Circuit Judges.*

ORDER:

This case was voted en banc by a duly constituted quorum of the court consisting of nine members in regular active service who are not disqualified. Fed. R. App. P. 35(a); 28 U.S.C. § 46(d).

The grant of rehearing en banc in this case "vacate[d] the panel opinion and judgment of the court and stay[ed] the mandate." 5th Cir. R. 41.3.; *see also Thompson v. Connick,* 578 F.3d 293 (5th Cir. 2009) (en banc) (same).

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* Chief Judge Jones and Judges King, Wiener, Garza, Benavides, Elrod, Southwick, and Haynes are recused.

After the en banc court was properly constituted, new circumstances arose that caused the disqualification and recusal of one of the nine judges, leaving only eight judges in regular active service, on a court of sixteen judges, who are not disqualified in this en banc case. Upon this recusal, this en banc court lost its quorum. Absent a quorum, no court is authorized to transact judicial business. *See Nguyen v. United States,* 539 U.S. 69, 82 n.14 (2003) (quoting *Tobin v. Ramey,* 206 F.2d 505, 507 (5th Cir. 1953)).

The absence of a quorum, however, does not preclude the internal authority of the body to state the facts as they exist in relation to that body, and to apply the established rules to those facts.

In arriving at our decision, directing the clerk to dismiss this appeal, this en banc court has considered and rejected each of the following options:

1. *Asking the Chief Justice to appoint a judge from another Circuit pursuant to 28 U.S.C. § 291.* We have rejected this argument as precluded by our precedent, *United States v. Nixon,* 827 F.2d 1019 (5th Cir. 1987), and because § 291 provides an inappropriate procedure, unrelated to providing a quorum for the en banc court of a circuit.

2. *Declaring that there is a quorum under the provisions of Federal Rule of Appellate Procedure 35(a).* We believe that a quorum is properly defined under 28 U.S.C. § 46 as constituting a majority of the judges of the entire court who are in regular active

service, and not as a body of the non-recused judges of the court, however few.

3. *Adopting the Rule of Necessity.* The Rule of Necessity – allowing disqualified judges to sit – is not applicable in this case because it would be inappropriate to disregard the disqualification of the judges of this Court when the appeal may be presented to the Supreme Court of the United States for decision. Moreover, there is no established rule providing that an en banc court lacking a quorum, may disregard recusals and disqualifications of all judges so that an en banc court may be formed. Nor is there any method to select one particular judge among the several disqualified judges in order to provide a bare minimum for a quorum.

4. *"Dis-enbancing" the case and ordering the panel opinion reinstated, and issuing the mandate thereon.* This case was properly voted en banc. The panel opinion and the judgment of the panel were lawfully vacated. Without a quorum to conduct any judicial business, this en banc court has no authority to rewrite the established rules of the Fifth Circuit for this one case and to order this case, properly voted en banc, "dis-enbanced." Moreover, we have no authority to interpret a plainly applicable rule as simply a blank, on grounds that "it was not designed to apply" to a situation where its terms have undisputed application.

> 5. *Holding the case in abeyance until the composition of the court changes.* It is purely speculative as to when the current vacancy on this court will be filled and it is, of course, unknown whether that judge may also be recused. Furthermore, we have no way of knowing when another sitting judge in regular active service of the Court may become "undisqualified" or indeed whether another judge of this en banc court may become disqualified to sit further. The Wright and Miller treatise has observed:
>
> > Any decision of this character, however, should be made *as promptly as possible*; delay that spans several months and the addition of new judges, and that creates at least the appearance of a decision that could not have been reached earlier, *should be avoided at all costs.*
>
> 16AA WRIGHT & MILLER § 3981.3, at 448 (2008) (emphasis added).

In sum, a court without a quorum cannot conduct judicial business. This court has no quorum. This court declares that because it has no quorum it cannot conduct judicial business with respect to this appeal. This court, lacking a quorum, certainly has no authority to disregard or to rewrite the established rules of this court. There is no rule that gives this court authority to reinstate the panel opinion, which has been vacated. Consequently, there is no opinion

or judgment in this case upon which any mandate may issue. 5TH CIR. R. 41.3.

Because neither this en banc court, nor the panel, can conduct further judicial business in this appeal, the Clerk is directed to dismiss the appeal.

The right of individual judges to write further after entry of this Order is preserved.

The parties, of course, now have the right to petition the Supreme Court of the United States.

This, the 28th day of May, 2010.

Judge Davis dissents with reasons, joined by Judge Stewart. Judge Dennis dissents with reasons.

W. EUGENE DAVIS, Circuit Judge, joined by CARL E. STEWART, Circuit Judge, Dissenting.

I dissent from the order dismissing this appeal for the following reasons.

As the order states, we do not have a quorum of the court to act in this case. By way of background, a panel of this court, after full consideration of the briefs and oral argument, decided appellant's appeal. Appellee then applied for en banc rehearing and a vote was taken. Only nine of the seventeen active judges were unrecused and qualified to participate in a vote. By 6 to 3, the nine qualified judges voted to grant rehearing en banc. Shortly after the case was voted en banc, one of the six judges voting for en banc

declared herself recused thereby causing the court to lose its quorum. Instead of declaring that the loss of a quorum automatically dis-enbanced the case causing the case to return to its status before it was voted en banc, five of the eight remaining unrecused judges voted to enter the attached order dismissing the appeal. The five judges who entered this order reasoned that this result was mandated by our Local Rule 41.3, which provides: "Unless otherwise expressly provided, the granting of a rehearing en banc vacates the panel opinion and judgment of the court and stays the mandate."

1. Local Rule 41.3 was never designed to apply in this situation where the court, after voting a case en banc, loses its quorum and the en banc court never considers the appeal on its merits. It is a provisional, practical rule that alerts practitioners and courts of the fact that the panel opinion is not precedential pending consideration of the merits of the case by the en banc court.

It makes no sense to allow a vote to take a case en banc to dictate the result on the merits. Judges vote for en banc consideration for any number of reasons other than the fact that they conclude that the panel has reached an erroneous result. They may vote for en banc simply because they believe it presents a serious question that the full court should consider or simply because they have some question about the correctness of the result. Judges are rarely prepared to definitively decide the merits of the case

when they vote for or against en banc reconsideration.

2. Appellants in this case have a statutory right to appeal the adverse judgment of the district court to this court. The dismissal of this appeal based on a local rule has the effect of depriving appellants of their right to an appeal and allows the local rule to trump federal statutes.

3. Moreover, I find an inexplicable disconnect between the notion that a majority of the eight unrecused judges has no authority to do anything except literally apply our Local Rule 41.3 strictly as written; yet they do have the authority to dismiss the appeal.

4. Alternatively, 28 U.S.C. § 291 provides an avenue that would avoid depriving appellant of his direct appeal. Section 291 permits the Chief Justice to appoint a judge from another circuit to allow this court to have a quorum to consider the case en banc. 28 U.S.C. § 291 provides that: "(a) the Chief Justice of the United States may, in the public interest, designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon request of the chief judge or circuit justice of such circuit." Acting Chief Judge E. Grady Jolly indicated his willingness to request the Chief Justice to designate such a temporary judge if a majority of the eight judges had requested it. We are aware that it would be an unusual request to appoint a judge from another circuit to constitute a quorum of the en banc court but we

believe such a request is justified here where the alternative is the appellant must completely lose his right to a direct appeal.

DENNIS, Circuit Judge, dissenting:

I respectfully dissent from the decision by the majority of this en banc court to refuse to hear oral argument or to decide this appeal on its merits, but to take the shockingly unwarranted actions of ruling that the panel decision has been irrevocably vacated and dismissing the appeal without adjudicating its merits. The majority's decision to declare that we no longer have a quorum, and to take the drastic action of dismissing the appeal without hearing its merits, but with the intention of reinstating the district court's judgment, is manifestly contrary to law and Supreme Court precedents. The majority's action is deeply lamentable because it was forewarned of the reasons militating against its erroneous rush to judgment by the parties' letter briefs and by internal memoranda. If the five-judge en banc majority's precipitous summary dismissal of the appeal is not corrected, it will cause the sixteen-active judge body of this United States Court of Appeals to default on its absolute duty to hear and decide an appeal of right properly taken from a final district court judgment.

The majority's order mischaracterizes itself as merely stating the facts and "apply[ing] the established rules to those facts." In truth, however, the majority is making the fully informed *choice* to dismiss

this unadjudicated appeal and finally terminate this litigation, even while turning a blind eye to several legally viable alternative courses of action and claiming to have no power to take any further action in the case due to the supposed lack of a quorum.[1]

The majority's decision to dismiss this appeal rests, first of all, on an implausible interpretation of the statute that defines a quorum of an en banc court of appeals, 28 U.S.C. § 46(c)-(d). Second, it contravenes the long-established rule that "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *New Orleans Public Service, Inc. v. Council of the City of New*

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[1] The language of the order of dismissal underscores the contradiction inherent in issuing such an order while simultaneously claiming to lack the power to take any action in this case. The order asserts the authority "to state the facts as they exist . . . and to apply the established rules to those facts." But United States circuit judges have no independent authority to apply law to facts and issue orders thereupon. We can issue orders only through a properly constituted quorum (with limited exceptions not relevant here, *see* Fed. R. App. P. 27(c)). A quorum is "the minimum number of members . . . who must be present for a deliberate assembly to legally transact business." *Black's Law Dictionary* (8th ed. 2004).

If we lack a quorum, then the group of judges who are purporting to issue the order of dismissal cannot issue such an order any more than a single circuit judge can dismiss a case on behalf of a three-judge panel.

I believe that we do have a quorum under 28 U.S.C. § 46 and must decide the appeal, but since the majority believes we lack a quorum, they contradict themselves by asserting that they have the power to dismiss the case.

Orleans, 491 U.S. 350, 358 (1989). There are several affirmative grounds that authorize us to fulfill "the absolute duty of judges to hear and decide cases within their jurisdiction." *United States v. Will,* 449 U.S. 200, 215 (1980). These grounds are as follows: (1) we do have a quorum under the correct reading of § 46(c)-(d), which is also supported by Fed. R. App. P. 35(a); (2) the acting chief judge of this court has the authority to seek the designation and assignment of a judge from another circuit under 28 U.S.C. §§ 291 & 296; (3) we can follow the Supreme Court's example in *North American Co. v. SEC,* 320 U.S. 708 (1943), and hold the case over until the President and the Senate fill this court's current vacancy and give us nine out of seventeen active judges who can decide the case; and if all else fails, (4) we should comply with the ancient common-law doctrine known as the Rule of Necessity, which overrides the federal statute governing judicial recusals, as the Supreme Court held in *Will,* 449 U.S. at 217. The Rule of Necessity, and not dismissal, is the appropriate last resort in this situation because it fulfills this court's absolute duty to decide cases within its jurisdiction. The majority's action flouts that duty.

Last but not least, the dismissal of this appeal – with the apparent intention to effectively reinstate the district court's order dismissing the case, even though a panel of this court has already held that the district court erred, 585 F.3d 855 (5th Cir. 2009) – is contrary to common sense and fairness. Indeed, it is injudiciously mechanistic and arbitrary. For example,

if the most recently recused judge had become recused three months earlier, the outcome of this case would have been precisely the opposite: the court could not have granted rehearing en banc (at least not while following the majority's current definition of an en banc quorum), so the panel's decision reversing the district court's dismissal of the case would have remained in effect. Thus, because of the majority's erroneous interpretation of 28 U.S.C. § 46(c)-(d) and its refusal to discharge this court's absolute duty to decide cases within its jurisdiction, the particular timing of one single judge's recusal is being allowed to conclusively determine the outcome of this case.[2]

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[2] I agree with almost all of Judge Davis's dissent, including his well-considered view that if the en banc court lacks a quorum, then it is effectively dissolved and Fed. R. App. P. 41(d)(1) requires the panel's mandate to issue notwithstanding anything in our local rules to the contrary. The panel's decision is the most recent and authoritative decision concerning the issues raised in this appeal; that decision, not the district court's overruled decision, should control if the en banc court is unable to act.

Despite my agreement with Judge Davis, at some points in this opinion I will assume for the sake of argument that the panel's decision has been irrevocably vacated under 5th Cir. R. 41.3 and that its mandate cannot issue.

My only point of disagreement with Judge Davis concerns his view that the en banc court lacks a quorum. As I explain herein, that view is based on an erroneous reading of 28 U.S.C. § 46.

I. FACTS

The district court dismissed this case on the grounds that the plaintiffs lacked standing and that the case presented a nonjusticiable political question. The plaintiffs filed their notice of appeal in September 2007. The case was assigned to a three-judge panel of this court. Oral argument was held before a quorum of two judges because the third judge had a family emergency. One of the two remaining judges then recused himself, depriving the panel of a quorum. The case was then rescheduled for oral argument before a second three-judge panel. That panel issued its ruling in October 2009, reversing the district court's dismissal of the case. 585 F.3d 855 (5th Cir. 2009).

The defendants-appellees petitioned for rehearing en banc. The nine active circuit judges who were not recused at that time granted rehearing en banc by a vote of six to three. 598 F.3d 208 (5th Cir. 2010). Then, in April 2010, one of those nine judges became recused, leaving eight out of sixteen active judges still able to participate in the case, and forcing the eight nondisqualified judges to decide whether we still have a quorum and, if not, what is to be done. We asked the parties to submit letter briefs on the issue. Now, a majority of the nondisqualified judges – five out of eight – have voted to dismiss the case.

II. ANALYSIS

A. This en banc court has a quorum as defined by 28 U.S.C. § 46.

The majority's reading of the statutory quorum requirement as requiring nine out of sixteen active judges for an en banc quorum is erroneous. 28 U.S.C. § 46(c) defines an en banc court as follows: "A court in banc shall consist of all circuit judges in regular active service," with certain exceptions that are not relevant here. The majority reads "all circuit judges in regular active service" as including judges who are disqualified from taking part in a particular case. But if it really meant that, then the statute would necessarily require all disqualified active judges to sit as part of the en banc court in every case that is heard or reheard en banc.[3] However, no one thinks that Congress wanted to require disqualified judges to sit in en banc cases, so we do not read the statute that way. Instead, we routinely conduct en banc hearings and rehearings while excluding disqualified judges. Thus, our ordinary understanding of the category "all circuit judges in regular active service" excludes disqualified judges.

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[3] This seemingly self-evident point is also made by the Advisory Committee Notes to the 2005 amendment to Fed. R. App. P. 35(a): "It is clear that 'all circuit judges in regular active service' in the second sentence [of § 46(c)] does not include disqualified judges, as disqualified judges clearly cannot participate in a case being heard or reheard en banc."

The statute goes on to define a quorum as "[a] majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c)." *Id.* § 46(d). Thus, a quorum of an en banc court is a majority of "all circuit judges in regular active service," a category that has to exclude disqualified judges because the alternative would be absurd. Therefore, in this case, "all circuit judges in regular active service" under § 46(c) simply means the eight judges who are not disqualified, and a quorum is a majority of those judges.[4]

That has always been the most logical reading of the statute. The 2005 amendment to Fed. R. App. P. 35(a)[5] effectively did away with our circuit's former

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[4] This reading of the statute does not render the quorum requirement meaningless; it only defines a quorum as a majority of the nondisqualified active judges. A majority of the qualified active judges still must be present in order for the court to conduct business. Thus, a quorum can be lost through circumstances other than disqualification, such as illnesses or family emergencies that may render judges temporarily unable to participate.

[5] The 2005 amendment clarified that only a majority of nondisqualified judges is needed in order to vote a case en banc. The history and reasons behind it are explained in the Advisory Committee Notes. The amended version of Rule 35(a) adopts a uniform national interpretation of § 46(c) and requires us to read the phrase "the circuit judges of the circuit who are in regular active service" in the first sentence of § 46(c) to *exclude* disqualified judges. Nonetheless, the majority in this case insists on reading the phrase "all circuit judges in regular active service" in the second sentence of § 46(c) to *include* disqualified judges.

version of a local rule, 5th Cir. R. 35.6, which had followed a contrary reading.[6] After the 2005 amendment was passed, we did not adopt a rule (like those the First, Third, and Federal Circuits have adopted) defining a quorum for conducting en banc court business as a majority of all active judges including disqualified judges.[7] Despite the absence of any such rule in this circuit, the majority is proceeding as if we actually had a local rule defining a quorum as a majority of all active judges including disqualified judges. Because we have no such rule, we must instead simply follow the statute itself, which requires only a majority of nondisqualified judges to constitute a quorum.

The majority's erroneous interpretation of § 46(c) is simply inconsistent with our routine practice of excluding disqualified judges from participating in rehearing en banc. We should accept that we have a quorum, as defined by § 46(c)-(d), and decide the case.

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[6] The pre-2005 version of 5th Cir. R. 35.6 said, "Judges in regular active service who are disqualified for any reason or who cannot participate in the decision of an en banc case nevertheless shall be counted as judges in regular active service."

[7] *See* 1st Cir. R. 35.0(a); 3d Cir. I.O.P. 9.5.3; Fed. Cir. R. 47.11. Such local rules appear to be permitted by the final paragraph of the Advisory Committee Notes to the 2005 amendment to Rule 35(a), which states, "the amendment is not intended to foreclose the possibility that § 46(d) might be read to require that more than half of all circuit judges in regular active service be eligible to participate in order for the court to hear or rehear a case en banc."

B. The dismissal of this case violates the rule that federal courts have an absolute duty to render decisions in cases over which they have jurisdiction.

1. The Absolute Duty to Decide Cases

The Supreme Court's "cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred. For example: 'We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.'" *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans,* 491 U.S. 350, 358 (1989) (quoting *Cohens v. Virginia,* 19 U.S. 264, 404 (1821)). There is a good reason why this rule has been in place for two centuries: society depends on the courts to resolve disputes in accordance with the laws.[8] The political branches should be able to count on the federal courts to decide *all* the cases over which they have been given jurisdiction.[9] This court has jurisdiction over this case

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[8] "Law . . . must resolve disputes finally and quickly." *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 597 (1993). "The province of the court is, solely, to decide on the rights of individuals. . . ." *Marbury v. Madison,* 5 U.S. 137, 170 (1803). "The fundamental role of the courts is to resolve concrete and present disputes between parties." *Principal Life Ins. Co. v. Robinson,* 394 F.3d 665, 671 (9th Cir. 2005).

[9] "Only Congress may determine a lower federal court's subject-matter jurisdiction." *Kontrick v. Ryan,* 540 U.S. 443, 454 (2004). "[T]he judicial power of the United States . . . is (except in enumerated instances, applicable exclusively to [the Supreme]

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because it is an appeal from a final order of a federal district court, in a suit between parties from different states, in which more than $75,000 is at stake. *See* 28 U.S.C. §§ 1291, 1332. The majority does not and cannot deny that this court has jurisdiction[10] – yet it chooses not to exercise that jurisdiction, in the face of two centuries of jurisprudence dating back to Chief Justice Marshall.[11]

Court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." *Ankenbrandt v. Richards*, 504 U.S. 689, 698 (1992) (quoting *Cary v. Curtis*, 44 U.S. 236, 245 (1845)).

[10] *See United States v. Will*, 449 U.S. 200, 211 (1980) (explaining that the federal statute governing judicial recusals, 28 U.S.C. § 455, "does not affect the jurisdiction of a court").

Because this appeal involves the standing and political question doctrines, one side argues that the federal courts ultimately do not have jurisdiction over this case. Nonetheless, there is no doubt that the panel had jurisdiction and that we still have jurisdiction to decide this appeal, because "it is familiar law that a federal court always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 628 (2002).

[11] *E.g., Marshall v. Marshall*, 547 U.S. 293, 298-99 (2006) ("Chief Justice Marshall famously cautioned: 'It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" (quoting *Cohens*, 19 U.S. at 404)); *Pierson v. Ray*, 386 U.S. 547, 554 (1967) ("It is a

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Just as courts have an "absolute duty . . . to hear and decide cases within their jurisdiction," *United States v. Will,* 449 U.S. 200, 215 (1980), litigants have a corresponding due process right to have their cases decided when they are properly before the federal courts. "The parties to a civil action may appeal 'as a matter of right' under Fed. R. App. P. 3 from the final judgment of a district court to the circuit court of appeals except where direct review may be had in the Supreme Court." *Matter of McLinn,* 739 F.2d 1395, 1398 (9th Cir. 1984) (en banc). "The right of appeal is statutory, and the grant is subject to due process requirements." *United States v. DeLeon,* 444 F.3d 41, 58 (1st Cir. 2006) (citing *Evitts v. Lucey,* 469 U.S. 387, 393 (1985)). The right to appeal would be of little value if the courts of appeals were not required to render decisions in cases that are properly brought before them.

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judge's duty to decide all cases within his jurisdiction that are brought before him. . . . "); *Kline v. Burke Const. Co.,* 260 U.S. 226, 234 (1922) ("[The plaintiff] had the undoubted right . . . to invoke the jurisdiction of the federal court and that court was bound to take the case and proceed to judgment."); *Willcox v. Consol. Gas Co. of N.Y.,* 212 U.S. 19, 40 (1909) ("When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . ."); *Chicot County v. Sherwood,* 148 U.S. 529, 534 (1893) ("[T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends.") (quoting *Hyde v. Stone,* 61 U.S. 170, 175 (1857)).

This court initially fulfilled its duty to decide this case when the panel rendered its decision in this appeal. 585 F.3d 855 (5th Cir. 2009). If the panel's decision had been allowed to take effect, then the court's duty would have been discharged.[12] But the court's decision to rehear the case en banc had the effect of vacating the panel's decision under Fifth Circuit Rule 41.3.[13] Because the panel's decision has been vacated, the court is now back in the position it was in before the panel rendered its decision: it has an absolute duty to hear and decide the appeal. The only difference is that now the en banc court, rather than the panel, has control over the case and therefore has the duty to render a decision.

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[12] If the court had believed it could not grant rehearing en banc due to lack of a quorum, there would have been no violation of the court's duty or of the parties' rights because there is no statutory or constitutional right to rehearing en banc. *See United States v. Nixon*, 827 F.2d 1019, 1022 (5th Cir. 1987) (per curiam).

[13] I agree with Judge Davis's reading of Rule 41.3, under which the panel's decision should be treated as having been only provisionally vacated pending the outcome of rehearing en banc, and the panel's mandate should therefore issue pursuant to Fed. R. App. P. 41(d)(1) because of the dissolution of the en banc court.

Here, however, I nonetheless assume for the sake of argument that we should treat the panel's decision as having been vacated.

2. The Rule of Necessity

Assuming for the sake of argument that the en banc court lacks a quorum, and also assuming that all other possible means of carrying out this court's duty have been ruled out, this court's last resort should be to decide that the Rule of Necessity applies and, accordingly, ask the active circuit judges who have recused themselves from this case to consider setting aside their recusals in order to decide this appeal. The Supreme Court in *United States v. Will* explained the Rule of Necessity as follows: it is the "well-settled principle at common law that . . . 'although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise.'" 449 U.S. at 213 (quoting Frederick Pollock, *A First Book of Jurisprudence* 270 (6th ed. 1929)). The Court held in *Will* that the Rule of Necessity overrides the federal statute providing for the disqualification of judges, 28 U.S.C. § 455. *Id.* at 217 ("We therefore hold that § 455 was not intended by Congress to alter the time-honored Rule of Necessity."). If there is no other way for this court to carry out its duty, then we are required to follow *Will* and recognize that the Rule of Necessity requires some or all of our fellow active circuit judges to set aside their recusals.

As the Court explained in *Will,* the Rule of Necessity arises directly from the rule that federal courts cannot decline to exercise their jurisdiction:

> Chief Justice Marshall's exposition in *Cohens v. Virginia* could well have been the explanation of the Rule of Necessity; he wrote that a court "must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. *We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.* The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them."

Id. at 216 n.19 (citation omitted) (quoting *Cohens*, 19 U.S. at 404). Moreover, the Rule goes back more than five centuries, *id.* at 213, and "has been consistently applied in this country in both state and federal courts," *id.* at 214.

The Rule of Necessity is often invoked when every judge, or all the judges of a particular court, would otherwise be disqualified. For example, *Will* involved a challenge to the validity of statutes that affected the salaries of all federal judges, *see id.* at 209-10, and the Second Circuit applied the Rule in *Tapia-Ortiz v. Winter* when a litigant had sued every judge in the circuit, 185 F.3d 8, 10 (2d Cir. 1999) (per curiam). But the Rule is not limited to such extreme cases; it also applies to situations in which even a

single judge's disqualification would have the effect of preventing a properly brought case from being heard. This point is clearly established by the Supreme Court's opinion in *Will* and the cases quoted and cited therein.

For instance, the *Will* Court approvingly quoted the following passage from a Kansas Supreme Court case in which only one justice's disqualification was at issue:

> [I]t is well established that actual disqualification of *a member* of a court of last resort will not excuse *such member* from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated.

Will, 449 U.S. at 214 (emphasis added) (quoting *State ex rel. Mitchell v. Sage Stores Co.*, 143 P.2d 652, 656 (Kan. 1943)). The disqualification issue in *Mitchell* was that one justice had previously been involved in the case while serving as the state's attorney general.[14]

Will also gave the example of "*Mooers v. White*, 6 Johns. Ch. 360 (N.Y.1822), [in which] Chancellor Kent continued to sit despite his brother-in-law's being a party; New York law made no provision for a

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[14] That justice preferred not to participate but had to do so, in compliance with the Rule of Necessity, because the court was unable to reach a decision without him. 143 P.2d at 656.

substitute chancellor. *See In re Leefe,* 2 Barb. Ch. 39 (N.Y.1846)." *Will,* 449 U.S. at 214 n.15. In addition, *Will* approvingly cited *Moulton v. Byrd,* in which the Alabama Supreme Court held that the Rule of Necessity compelled a justice of the peace who had previously acted as an attorney for the plaintiff not to recuse himself from deciding the case. 449 U.S. at 214 n.16 (citing *Moulton v. Byrd,* 140 So. 384 (Ala. 1932)). Each of these situations – a judge's previous involvement in a case as a government official, a judge being a party's brother-in-law, or a judge's previous service as a party's attorney – concerned the disqualification of a single judge, not of all judges. But the Supreme Court in *Will* held them all up as examples of the proper application of the Rule of Necessity, because each of them met the essential criterion for the Rule's applicability: "the case cannot be heard otherwise." *Will,* 449 U.S. at 213.

The Rule of Necessity is also not limited to courts of last resort. The cases cited in *Will* make that clear: neither *Mooers* nor *Moulton,* for instance, involved a judge of a court of last resort. This court has also invoked the Rule before, in *Duplantier v. United States,* 606 F.2d 654, 662-63 (5th Cir. 1979).[15]

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[15] Moreover, as a practical matter, "the circuit courts of appeal . . . are the courts of last resort in the run of ordinary cases." *Textile Mills Sec. Corp. v. Comm'r of Internal Revenue,* 314 U.S. 326, 335 (1941).

Thus, under *Will,* the Rule of Necessity clearly applies to cases in which the court is deprived of a quorum by the recusals of some (rather than all) judges, and it applies even if the court is not a court of last resort. If the en banc court lacks a quorum in this case, and if we have no other way of making it possible to decide this appeal, then the bottom line is that this court is required to invoke the Rule of Necessity rather than dismissing the case.[16]

The only authority that anyone has offered in opposition to the Rule of Necessity is *Chrysler Corp. v. United States,* 314 U.S. 583 (1941) (mem.), in which five Justices of the Supreme Court dismissed a case

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[16] The decision whether to invoke the Rule of Necessity properly rests with each of the active judges who are currently recused, rather than with the eight nondisqualified judges. Only they have the power to set aside their own recusals; we cannot order them to do so.

Each recused judge would need to address the debatable issue of exactly which judges should set aside their recusals. Perhaps they should all do so, because they each owe a duty to prevent this court from defaulting on its duty to decide this appeal which is properly within its jurisdiction. Or perhaps only those judges who have relatively small interests in the case, such as owning small amounts of stock which can easily be sold, should unrecuse themselves.

But, regardless of how this issue is resolved, it remains clear that "the absolute duty of judges to hear and decide cases within their jurisdiction," *Will,* 449 U.S. at 215, requires that at least some recused judges participate in the case if there is no other means of carrying out the court's duty to render a decision.

on direct appeal[17] because they lacked a quorum of six Justices as required by statute. *Chrysler* is a memorandum opinion containing no reasoning or authorities, so it is unknown why the Supreme Court did not apply the Rule of Necessity in that case. But the dismissal of the case in *Chrysler* was plainly inconsistent with the Rule of Necessity as the Court subsequently explained it in *Will:* the recusals of four Justices meant the case could not be heard otherwise,[18] so under *Will,* the Rule ought to have overridden the recusals that deprived the *Chrysler* Court of a quorum. Thus, *Chrysler* and *Will* appear to be inconsistent. The question for this court, therefore, is which of the two we should follow. *Chrysler* is a bare memorandum opinion issued in 1941 by five Justices without a quorum, whereas *Will* is a fully reasoned, unanimous opinion joined by eight Justices and issued in 1980. The fact that *Will* is more recent than *Chrysler* should be enough to tell us what to do: when two Supreme Court precedents disagree, the more recent one obviously controls. If there were any

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[17] In most cases, the Supreme Court has discretion as to whether to hear a case at all, so the Rule of Necessity does not come into play when the Court affirms a lower court's decision due to lack of a quorum. *See, e.g., Am. Isuzu Motors, Inc. v. Ntsebeza,* 128 S. Ct. 2424 (2008) (mem.). But the *Chrysler* case cannot be distinguished in this way because it came to the Supreme Court on direct appeal from a district court, rather than on a writ of certiorari.

[18] If the situation in *Chrysler* arose today, the Court could instead remit the case to a court of appeals as provided by 28 U.S.C. § 2109, but that statute had not yet been enacted in 1941.

remaining doubt about whether to follow *Will* or *Chrysler*, it should be erased by the fact that the Supreme Court's decision in *Will* rested on more than five hundred years of precedent, 449 U.S. at 213, whereas the *Chrysler* decision was supported by no explanation whatsoever.[19] Nonetheless, the majority ignores *Will* and follows *Chrysler*.

In summary, under *Will*, a judge is obligated to take part in the decision of a case, even if he or she has a personal interest in it, if the case cannot be heard otherwise. 449 U.S. at 213. This obligation overrides the federal statute on disqualification. *Id.* at 217. It arises from "the absolute duty of judges to hear and decide cases," *id.* at 215, and from the rule that federal courts cannot decline to exercise their jurisdiction, *id.* at 216 n.19. Therefore, if the en banc court lacks a quorum and if we can find no other way of carrying out our duty to decide this case, then as a last resort we must apply the Rule of Necessity rather than dismissing the appeal.

3. Inviting a Judge from Another Circuit

As Judge Davis has also observed, another way to fulfill our duty to decide this appeal would be to follow the procedure set out in 28 U.S.C. § 291: "The

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[19] Additionally, two years after dismissing the appeal in *Chrysler*, the Supreme Court in *North American Co. v. SEC*, 320 U.S. 708 (1943) (mem.), followed a different approach which was consistent with the Rule of Necessity. *See infra* section B(4).

Chief Justice of the United States may, in the public interest, designate and assign temporarily any circuit judge to act as circuit judge in another circuit on request by the chief judge or circuit justice of such court." In accordance with § 291, Judge Jolly, the acting chief judge in this case, can request the designation and assignment of a judge from another circuit to give us a quorum.[20] He does not need the authorization or votes of any other judges in order to make that request, and he ought to do so: it would surely be "in the public interest," since it would enable this court to avoid defaulting on its duty to hear and decide this appeal.[21] Indeed, it is not uncommon for active circuit judges to sit by designation in other circuits, even without the kind of exigent circumstances that have arisen here. *E.g., Fleming v. Yuma*

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[20] This court's previous decision not to use § 291 in *United States v. Nixon*, 827 F.2d 1019 (5th Cir. 1987) (per curiam), does not control here. In *Nixon*, after a three-judge panel had decided the appeal, the defendant-appellant sought rehearing en banc and was denied. There were not enough nondisqualified active circuit judges to make up an en banc quorum as defined under this circuit's old Rule 35.6. However, in that case, the court was not obligated to invite outside judges to make up an en banc quorum, because a litigant has no statutory or constitutional right to rehearing en banc. *See id.* at 1022. The difference between *Nixon* and this case is that here, the panel's decision has been vacated by the granting of rehearing en banc, so this court has not fulfilled its duty to decide the appeal.

[21] The Chief Justice might have denied the request and pointed out that we already have a quorum under 28 U.S.C. § 46(c)-(d), as discussed above. That, too, would have helped us to decide this case.

Reg'l Med. Ctr., 587 F.3d 938 (9th Cir. 2009) (Tymkovich, J., of the Tenth Circuit, sitting by designation); *E.I. DuPont de Nemours & Co. v. United States*, 508 F.3d 126 (3d Cir. 2007) (Michel, C.J., of the Federal Circuit, sitting by designation).

The idea that a judge of another circuit could take part in an en banc rehearing of this court may seem counterintuitive to some, but it is authorized by statute: "Such justice or judge shall have *all the powers* of a judge of the court, circuit, or district to which he is designated or assigned," subject to minor exceptions that are not relevant here. 28 U.S.C. § 296 (emphasis added). Moreover, that "judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned" and "[h]e may be required to perform any duty which might be required of a judge of the . . . circuit to which he is designated and assigned." *Id.* Thus, a judge temporarily assigned to the Fifth Circuit becomes, for all intents and purposes, a full-fledged member of this court.[22]

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[22] Furthermore, the same statute expressly allows a judge who is designated and assigned to another circuit to participate in the rehearing en banc of any matter that has come before him or her:

> A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such

(Continued on following page)

For the acting chief judge to seek the designation and assignment of a judge to participate in the en banc rehearing of this case would certainly be an unusual step upon a rare occasion, but it is authorized by the relevant statutes. Moreover, such a step would be no more unusual than the situation that calls for it, in which the en banc court has (supposedly) lost its quorum after granting rehearing en banc and thereby vacating the panel opinion. We therefore ought to make use of § 291 in order to enable us to carry out our absolute duty to render a decision in this case.

4. Holding the Case Over Until We Have a Quorum

One more way in which we could fulfill our duty to decide this case would be to follow the example set by the Supreme Court in *North American Co. v. SEC*, 320 U.S. 708 (1943) (mem.). In that case, the Supreme Court, which was one Justice short of a quorum, decided to hold the case over until such time as it had a quorum. Eventually the Court obtained a quorum and was able to decide the case. 327 U.S. 686 (1946).

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period *and in the consideration and disposition of applications for rehearing or further proceedings in such matters.*

28 U.S.C. § 296 (emphasis added).

The circumstances of *North American Co.* were similar to those of this case in an important way. In 1943, the Supreme Court had reason to believe that Congress would soon amend the relevant statute in order to make it possible for the Court to obtain a quorum. *See* John P. Frank, *Disqualification of Judges,* 56 Yale L.J. 605, 626 & nn.82-84 (1947). (Ultimately Congress did not amend the statute, but Chief Justice Stone withdrew his recusal to allow the Court to decide the case. *See id.*) In the instant case, there is no indication that Congress will alter our quorum requirement, but there is an eight-month-old vacancy on this court. When the President and the Senate fill the vacancy, then nine out of seventeen active judges of this court – a majority – will be able to hear and decide this case (provided that the judge who is appointed is not disqualified). Thus, like the Supreme Court in *North American Co.,* we have reason to believe that the political branches will soon give us a quorum, and we can wait for them to do so. It is unlikely that this court's current vacancy will continue for more than the two and a half years that the Supreme Court waited in *North American Co.*

The majority has chosen to follow the Supreme Court's example in *Chrysler* while ignoring the Court's more recent example in *North American Co.* This is the wrong choice because following *North American Co.* would allow us to fulfill our absolute duty to decide this case, whereas dismissing the case contravenes that duty.

* * *

In closing, it is worth emphasizing once more that the majority's dismissal of this case is a *decision* to reject several legally valid courses of action, not a merely ministerial application of settled rules as the majority suggests. It is therefore inconsistent with the majority's own rationale, which is predicated on the claim that we lack a quorum and therefore lack the power to take any action in this case. Despite our supposed lack of power, the majority has made the decision not to recognize that we have a quorum under 28 U.S.C. § 46; not to follow the example of the Supreme Court in *North American Co.;* not to invite an outside judge under 28 U.S.C. § 291; and not to apply the Rule of Necessity under *Will.* The majority has instead decided to dismiss a case over which we have jurisdiction, thereby violating the longstanding rule, dating back to *Cohens v. Virginia,* that we lack the power to decline to exercise the jurisdiction that has been conferred on us. Because this court has an absolute duty to render a decision in this appeal, I respectfully dissent.

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FIFTH CIRCUIT
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No. 07-60756, Ned Comer, et al v. Murphy Oil USA, et al USDC No. 1:05-CV-436

Dear Counsel:

The parties are requested to submit one letter brief per side of no more than twelve pages responding to this court's notification of April 30 that this en banc court has lost its quorum and cannot act on the merits of this case.

The parties may address the matter as they think appropriate. However, the court would direct their attention to Fed. R. App. P. 35(a), 28 U.S.C. § 46(c) and (d), Fed. R. App. P. 41(a) and (d)(1), 5th Cir. Local Rule 41.3, and Fed. R. App. P. 2, and the interplay of these rules and the statute in resolving the disposition of this appeal and this case. The parties may also consider the applicability of Chrysler Corp. v. United States, 314 U.S. 583 (1941); North American Co. v. Securities & Exchange Comm'n, 320 U.S. 708 (1943); and the Rule of Necessity. Each of these arguments assumes the absence of a quorum

unless Fed. R. App. P. 35(a) may be construed to provide a quorum.

The letter briefs must be filed simultaneously with the Clerk's Office before 5:00 p.m. on May 12. The parties will thereafter respond to the opposite filings in letter briefs (one response per side) of no more than six pages, which must be filed simultaneously with the Clerk before 5:00 p.m. on May 17.

Sincerely,

LYLE W. CAYCE, Clerk

By: /s/ Allison Lopez
Allison G. Lopez, Deputy Clerk
504-310-7702

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-60756

NED COMER; BRENDA COMER; ERIC HAYGOOD, husband of Brenda Haygood; BRENDA HAYGOOD; LARRY HUNTER, husband of Sandra L. Hunter; SANDRA L. HUNTER; MITCHELL KISIELWESKI, husband of Johanna Kisielweski; JOHANNA KISIELWESKI; ELLIOTT ROUMAIN, husband of Rosemary Roumain; ROSEMARY ROUMAIN; JUDY OLSON; DAVID LAIN,

Plaintiffs-Appellants

versus

MURPHY OIL USA; UNIVERSAL OIL PRODUCTS (UOP); SHELL OIL COMPANY; EXXONMOBIL CORP.; AES CORP.; ALLEGHENY ENERGY, INC.; ALLIANCE RESOURCE PARTNERS LP; ALPHA NATURAL RESOURCES, INC.; ARCH COAL, INC.; BP AMERICA PRODUCTION COMPANY; BP PRODUCTS NORTH AMERICA, INC.; CINERGY CORP.; CONOCOPHILLIPS COMPANY; CONSOL. ENERGY, INC.; THE DOW CHEMICAL COMPANY; DUKE ENERGY CORP.; EON AG; E.I. DUPONT DE NEMOURS & CO.; ENTERGY CORP.; FIRSTENERGY CORP.; FOUNDATION COAL HOLDINGS, INC.; FPL GROUP, INC.; HONEYWELL INTERNATIONAL, INC.; INTERNATIONAL COAL GROUP, INC.; MASSEY ENERGY CO.; NATURAL RESOURCE PARTNERS LP; PEABODY ENERGY

CORP.; RELIANT ENERGY, INC.; TENNESSEE VALLEY AUTHORITY; WESTMORELAND COAL CO.; XCEL ENERGY, INC.; CHEVRON USA, INC.; THE AMERICAN PETROLEUM INSTITUTE

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Mississippi

ON PETITIONS FOR REHEARING EN BANC

(Opinion October 16, 2009,
5 Cir. 2009, ___ F.3d ___)
Revised Opinion October 22,
5 Cir., 2009, ___ F.3d ___

(February 26, 2010)

BEFORE: JOLLY, DAVIS, SMITH, STEWART, DENNIS, CLEMENT, PRADO and ELROD, Circuit Judges.[1]

BY THE COURT:

A member of the court having requested a poll on the petitions for rehearing en banc, and a majority of the circuit judges in regular active service and not disqualified having voted in favor,

---

[1] Chief Judge Jones, and Judges King, Wiener, Garza, Benavides, Southwick and Haynes are recused and did not participate.

It is ordered that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

No. 10-291

In the Supreme Court of the United States

IN RE NED COMER, ET AL., PETITIONERS

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE TENNESSEE VALLEY AUTHORITY IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals should have dismissed the appeal after determining that it lacked a quorum to proceed with rehearing en banc.

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In the Supreme Court of the United States

No. 10-294

IN RE NED COMER, ET AL., PETITIONERS

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE TENNESSEE VALLEY AUTHORITY IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-32) is reported at 607 F.3d 1049. The order of the court of appeals granting rehearing en banc (Pet. App. 46-48) is reported at 598 F.3d 208, and the earlier opinion of a panel of the court of appeals is reported at 585 F.3d 855.

JURISDICTION

The order of the court of appeals dismissing petitioners' appeal was entered on May 28, 2010. The petition for a writ of mandamus was filed on August 26, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1651(a).

STATEMENT

1. The petition for a writ of mandamus turns on whether the court of appeals possessed a quorum to consider the underlying case after it granted rehearing en

banc. Congress has addressed how courts of appeals should hear cases as follows:

> (c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges * * *, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633)[.]
>
> (d) A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.

28 U.S.C. 46(c)-(d).[1]

Rule 35 of the Federal Rules of Appellate Procedure governs en banc proceedings and specifies that "[a] majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc." Fed. R. App. P. 35(a). In 2005, the phrase "and who are not disqualified" was added to that provision to eliminate a divergence in the practices of certain circuits concerning the effect that disqualifications had on the number of votes necessary to grant rehearing en banc. Before that amendment,

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[1] The provision that is cross-referenced in Section 46(c)—Section 6 of the Act of October 20, 1978—provides that "[a]ny court of appeals having more than 15 active judges * * * may perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals." Pub. L. No. 95-486, 92 Stat. 1633. Although the Fifth Circuit has sometimes had more than 15 active judges, it has never adopted a rule prescribing smaller en banc panels.

seven circuits (including the Fifth Circuit) had required the votes of an absolute majority of active judges to grant rehearing en banc. See Fed. R. App. P. 35, Comm. Notes on Rules—2005 Amend. (2005 Adv. Comm. Notes). Under that so-called "absolute majority" approach, "disqualified judges [we]re counted in the base in calculating whether a majority of judges ha[d] voted to hear a case en banc." *Ibid.*; see also *ibid.* ("[I]n a circuit with 12 active judges, 7 must vote to hear a case en banc. If 5 of the 12 active judges are disqualified, all 7 non-disqualified judges must vote to hear the case en banc."). By contrast, six circuits followed a "case majority" approach, which did not count judges who were disqualified in a particular case when determining the majority needed to grant rehearing en banc. *Ibid.* ("[I]n a case in which 5 of a circuit's 12 active judges are disqualified, only 4 judges (a majority of the 7 non-disqualified judges) must vote to hear a case en banc."). Two of those case-majority courts (the First and Third Circuits) qualified that approach further by adding a quorum requirement, which "provid[ed] that a case cannot be heard en banc unless a majority of all active judges—disqualified and non-disqualified—are eligible to participate." *Ibid.*

The 2005 amendment to Rule 35(a) adopted the case-majority approach, without any additional quorum requirement, although the Advisory Committee noted that the amendment was "not meant to alter or affect the quorum requirement of 28 U.S.C. § 46(d)." 2005 Adv. Comm. Notes. It further stated that the amendment was "not intended to foreclose the possibility that § 46(d) might be read to require that more than half of all circuit judges in regular active service be eligible to

participate in order for the court to hear or rehear a case en banc." *Ibid.*

2. Petitioners are residents and owners of property along the Mississippi coast of the Gulf of Mexico. They filed a putative class action in the United States District Court for the Southern District of Mississippi against respondents (the Tennessee Valley Authority (TVA) and more than two dozen private-sector entities in the energy and chemical industries). Petitioners alleged that respondents' activities had "caused the emission of greenhouse gas[es] that contributed to global warming" and "in turn caused a rise in sea levels and added to the ferocity of Hurricane Katrina, which combined to destroy [petitioners'] private property, as well as public property useful to them." They asserted claims for compensatory and punitive damages under Mississippi common law. See *Comer* v. *Murphy Oil USA*, 585 F.3d 855, 859 (5th Cir. 2009), vacated, 598 F.3d 208 (5th Cir. 2010).

On August 30, 2007, the district court dismissed petitioners' complaint, holding that they lacked standing and that their claims were nonjusticiable under the political-question doctrine. See Dist. Ct. Docket entry No. 368. The court explained its reasoning in an oral ruling from the bench. See *Comer*, 585 F.3d at 860 n.2.

Petitioners appealed, and a panel of the Fifth Circuit reversed in part, holding that petitioners had standing to raise some (but not all) of their claims, see *Comer*, 585 F.3d at 862-869, and that those claims were justiciable, *id.* at 869-879.[2]

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[2] Judge Davis concurred specially, stating he would have affirmed the dismissal of petitioners' claims on the alternative ground that they had "failed to allege facts that could establish that [respondents'] actions were a proximate cause of [petitioners'] alleged injuries." 585 F.3d at 880.

3. Respondents sought, and the court of appeals granted, rehearing en banc. See Pet. App. 46-48. By virtue of a local rule of the court of appeals, the grant of rehearing en banc had the effect of vacating the panel's opinion and judgment. See 5th Cir. R. 41.3 ("Unless otherwise expressly provided, the granting of a rehearing en banc vacates the panel opinion and judgment of the court and stays the mandate."). When the court of appeals granted rehearing en banc, on February 26, 2010, seven of the 16 active judges on the court of appeals were recused from the case, and the order granting rehearing en banc was issued by nine non-recused judges. See Pet. App. 47; see also *id.* at 2 (describing the rehearing order as having been based on "a duly constituted quorum of the court consisting of nine members in regular active service who are not disqualified").[3] In the next nine weeks, petitioners and respondents filed supplemental briefs, and the court permitted two amicus briefs to be filed. See 07-60756 Docket entries (5th Cir. Mar. 31, Apr. 23, and Apr. 30, 2010).

On April 30, 2010, the court of appeals notified the parties that one more judge had recused herself from the case, leaving the Fifth Circuit with eight active judges and eight recused judges (in addition to one vacancy). See Pet. App. 3, 44. On May 6, 2010, the court directed the parties to file letter briefs addressing the conclusion that the en banc court had "lost its quorum" and could not "act on the merits of this case." *Id.* at 44. That notification suggested that the parties address, among other things, whether Rule 35(a) of the Federal

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[3] The petition appendix erroneously omits Judge Owen from the list of judges participating in the order granting rehearing en banc. Compare Pet. App. 47, with 598 F.3d at 210.

Rules of Appellate Procedure could "be construed to provide a quorum." *Id.* at 45.

In their letter briefs, respondents contended that, despite the additional recusal, the en banc court had a quorum to decide the case and that, even if the court concluded that it lacked a quorum, it could and should achieve one by invoking the rule of necessity to permit a recused judge or judges to sit, or by requesting that the Chief Justice temporarily assign an active judge from another circuit pursuant to 28 U.S.C. 291(a). Respondents contended as a last resort that, if the court found that it incurably lacked a quorum, it should dismiss the appeal. See Resp. C.A. Letter Br. (May 12, 2010); Resp. C.A. Letter Reply Br. (May 17, 2010).

In their letter briefs, petitioners contended that, with only eight non-recused judges, the court of appeals had lost its quorum, and that it should accordingly allow the original panel to rule on respondents' rehearing petition. They also argued that the rule of necessity is inapplicable to en banc determinations and that it would violate the separation of powers for the Chief Justice to designate someone from another circuit to sit on the case. See Pet. C.A. Letter Br. (May 12, 2010); Pet. C.A. Letter Reply Br. (May 17, 2010).

4. a. On May 28, 2010, five of the eight non-recused judges, over the dissent of three judges, issued an order directing the clerk to dismiss the appeal. Pet. App. 1-6. The five judges explained that the grant of rehearing en banc "by a duly constituted quorum" of nine judges had vacated the panel's opinion and judgment and stayed the mandate, *id.* at 2, but that the "en banc court lost its quorum" upon the later recusal of an additional judge, *id.* at 3. The order stated that, "[a]bsent a quorum, no court is authorized to transact judicial business." *Ibid.*

Nevertheless, the order stated that the absence of a quorum did not "preclude the internal authority of the body" from "stat[ing] the facts as they exist in relation to that body, and [applying] the established rules to those facts." *Ibid.*

The order explained that "this en banc court" had "considered and rejected" five alternatives to dismissing the appeal because the court could not "conduct further judicial business in this appeal." Pet. App. 3, 6. The court declined to ask the Chief Justice of the United States to appoint a judge from another circuit, stating without further explanation that 28 U.S.C. 291 "provides an inappropriate procedure, unrelated to providing a quorum for the en banc court of a circuit." Pet. App. 3. The court also declined to invoke the "rule of necessity" as a basis to "allow[] disqualified [Fifth Circuit] judges to sit," concluding that "it would be inappropriate to disregard the disqualification of the judges of this Court when the appeal may be presented to the Supreme Court of the United States for decision." *Id.* at 4. And the court declined to hold the case in abeyance until the composition of the court changed to permit en banc action. The court expressed concern about the resulting delay, as well as uncertainty about when and whether the court would regain a quorum. *Id.* at 5.

The other dispositions that the court of appeals rejected depended on alternative constructions of the governing rules and statutes that would have avoided the conundrum it perceived. The court declined to conclude that the eight non-recused judges were sufficient to constitute a quorum, stating without further elaboration: "We believe that a quorum is properly defined under 28 U.S.C. § 46 as constituting a majority of the judges of the entire court who are in regular active service, and

not as a body of the non-recused judges of the court, however few." Pet. App. 3-4. The court also rejected the option of reinstating the panel's opinion and judgment, because they had been "lawfully vacated" and the subsequent absence of a quorum deprived the en banc court of any "authority to rewrite the established rules of the Fifth Circuit for this one case and to order this case, properly voted en banc, 'dis-enbanced.'" *Id.* at 4.

b. Three of the non-recused judges—all members of the original panel—dissented from the order dismissing petitioners' appeal. See Pet. App. 6-32. Judge Davis, joined by Judge Stewart, agreed that the court of appeals did "not have a quorum * * * to act in this case." *Id.* at 6.[4] He suggested that the non-recused judges should "declar[e] that the loss of a quorum automatically dis-enbanced the case causing [it] to return to its status before it was voted en banc." *Id.* at 7. In his view, "Local Rule 41.3 was never designed to apply in this situation," and "[i]t makes no sense to allow a vote to take a case en banc to dictate the result on the merits." *Ibid.* In the alternative, Judge Davis concluded that, although it would be "unusual," it would nevertheless be appropriate to request that the Chief Justice designate a judge from another circuit in order "to constitute a quorum of the en banc court." *Id.* at 8-9.

Judge Dennis (the author of the panel opinion) dissented and disagreed about the absence of a quorum.

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[4] Although immaterial to the result, Judge Davis's opinion said that the original en banc vote was taken when "nine of the seventeen active judges were unrecused and qualified to participate in a vote." Pet. App. 6. There were, however, 16 active judges at the time of the vote (see *id.* at 47; 598 F.3d at 210), because Judge Barksdale assumed senior status in August 2009. See United States Courts, *Current Judicial Vacancies*, http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/CurrentJudicialVacancies.aspx (last visited Nov. 29, 2010).

Pet. App. 9-32. He concluded that the language of 28 U.S.C. 46(c) and (d) requires a case-specific interpretation of the composition of the en banc court, which excludes disqualified judges. *Id.* at 14-18. Under that reading, a quorum in this case would be "a majority of" the "eight judges who are not disqualified." *Id.* at 15.

Judge Dennis also would have approved any of three alternatives that the majority rejected. He agreed with the other two dissenters that 28 U.S.C. 291 provided an appropriate mechanism for the Chief Justice to appoint a judge from another circuit to ensure a quorum. Pet. App. 27-30. He suggested that the court could hold the case until it obtained a quorum. *Id.* at 30-31. And he concluded that, as a "last resort," the court could invoke the "Rule of Necessity" to "ask the active circuit judges who have recused themselves from this case to consider setting aside their recusals in order to decide this appeal." *Id.* at 21.

5. On August 26, 2010, petitioners filed their petition for a writ of mandamus in this Court, seeking an order "directing" the Fifth Circuit to "return" their appeal "to the [three-judge] panel for final adjudication." Pet. 6. Petitioners did not seek a writ of certiorari to review the issues addressed by the panel's vacated decision or otherwise bring the underlying case before this Court.

On September 30, 2010, one of the previously recused judges on the court of appeals, Judge Wiener, assumed senior status. See United States Courts, *Current Judicial Vacancies*, http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/CurrentJudicialVacancies.aspx (last visited Nov. 29, 2010). Since that date, the Fifth Circuit has had 15 active judges, including eight judges who were not recused from petitioners' case on May 28, 2010. See United States Courts, *Fifth Circuit*

Detail Report, http://www.uscourts.gov/uscourts/Judges Judgeships/Vacancies/reports/jdarjdtl_appeals_A_05.html (last visited Nov. 29, 2010).

ARGUMENT

Petitioners have not satisfied the stringent standards necessary to warrant the extraordinary relief of mandamus. Mandamus is appropriate only when no other remedy is available, yet in this case the Court's certiorari jurisdiction would have extended to the order dismissing petitioners' appeal. Nor does this case—in which the court of appeals dismissed petitioners' appeal after entertaining proceedings for 30 months—involve the kind of judicial usurpation of power that this Court has previously found worthy of the discretionary exercise of its mandamus jurisdiction. Even if it did, petitioners have not demonstrated a clear and indisputable right to the relief they seek, because no constitutional or statutory provision guarantees them a right to a decision on appeal, and they acknowledge that multiple, inconsistent procedural outcomes are permissible. Moreover, their claims of error assume that the en banc court lacked a quorum when it dismissed the case, but the better reading of the relevant statute is that the court still possessed a quorum at that time. In any event, the recent decrease in the number of active judges on the court of appeals means that the en banc court would now appear to have a quorum even under petitioners' view, which would make the disposition they say was compelled—a remand to the three-judge panel—inappropriate, even if that disposition might otherwise have been warranted.

1. Under Supreme Court Rule 20.1, a mandamus petition must show that mandamus "will be in aid of the Court's appellate jurisdiction," that "exceptional circumstances" warrant its issuance, and that "adequate relief

cannot be obtained in any other form or from any other court." As this Court has explained, mandamus is available only in extraordinary cases to correct a lower court's "judicial usurpation of power" or "clear abuse of discretion." *Cheney* v. *United States Dist. Court*, 542 U.S. 367, 380 (2004) (internal quotation marks omitted). The party seeking a writ of mandamus bears the burden of proving that it has no other means of obtaining the relief desired, *Mallard* v. *United States Dist. Court*, 490 U.S. 296, 309 (1989), and that its "right to issuance of the writ is 'clear and indisputable,'" *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 384 (1953) (quoting *United States* v. *Duell*, 172 U.S. 576, 582 (1899)). Moreover, even when those "two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 381. Those stringent standards reinforce this Court's repeated observations that the writ is a "'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Id.* at 380 (quoting *Ex parte Fahey*, 332 U.S. 258, 259-260 (1947)). Petitioners have failed to meet those standards.

2. As an initial matter, petitioners have not established that mandamus is the only means for them to obtain relief. In fact, as the court of appeals suggested (Pet. App. 6)—and as petitioners themselves repeatedly acknowledged in the court of appeals[5]—petitioners could

[5] Petitioners invoked the prospect of this Court's certiorari jurisdiction in arguing against application of the rule of necessity and also in arguing that the court of appeals should not follow a practice of the Judicial Panel on Multidistrict Litigation. See Pet. C.A. Letter Br. 9 ("The Supreme Court can address the issues raised in this case."); Pet. C.A. Letter Reply Br. 4 ("[T]he litigants here have another avenue for relief by way of an application for writs of Certiorari to the U.S. Supreme Court.").

have sought review in this Court by petitioning for a writ of certiorari. Although they now assert in passing that certiorari is inapplicable to "cases for which the court of appeals did not reach a decision," Pet. 23, they do not address the terms of the controlling statute. Under 28 U.S.C. 1254(1), the Court's certiorari jurisdiction extends to all "[c]ases in the courts of appeals" and encompasses "any civil or criminal case, before or after rendition of judgment or decree."

Here, after petitioners appealed the district court's final order dismissing their complaint, their case was plainly "in the court[] of appeals" in the sense meant by Section 1254. And when the court directed the clerk "to dismiss the appeal," Pet. App. 6, it rendered a "judgment or decree." That dismissal order could have been subject to review by writ of certiorari. See *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742-743 & n.23 (1982). Moreover, even if the dismissal order did not constitute a "judgment or decree," the case was nonetheless "in the court[] of appeals" for purposes of certiorari jurisdiction. See, *e.g.*, *Heckler* v. *Edwards*, 465 U.S. 870, 876 (1984) (reviewing on certiorari a court of appeals order dismissing case on ground that it lacked statutory jurisdiction over appeal).[6]

Even in the absence of any of the other deficiencies discussed below, petitioners' inability to establish that they were unable to obtain relief from this Court "in any

[6] For similar reasons, petitioners cannot establish that mandamus would be necessary "in aid of th[is] Court's appellate jurisdiction." Sup. Ct. R. 20.1. If petitioners had sought review by certiorari of the standing and political-question-doctrine issues that were addressed by the district court and the three-judge panel, there would have been no doubt about this Court's jurisdiction. Although petitioners have declined to invoke this Court's jurisdiction over those issues (Pet. 22-23), that tactical decision cannot create a need for extraordinary relief.

other form" (Sup. Ct. R. 20.1) is sufficient to show that mandamus relief is unwarranted.

3. Petitioners also fail to establish the second predicate for mandamus: that they have a clear and indisputable right to relief. See *Cheney*, 542 U.S. at 381. That failure is evident on the face of their petition, because petitioners themselves are uncertain about the proper course for the court of appeals to have followed and the rationale supporting any such course. Petitioners principally argue that they are entitled to have this case "returned to the [three-judge] panel for action." Pet. 25; see also Pet. 6, 29, 35-36. But they also assert that it would not have been "unreasonable" for the Fifth Circuit to "plac[e] the case on a special docket to wait until a new judge could be confirmed." Pet. 31, 32. Waiting for a new judge to join the en banc court is inconsistent with being obligated to remand the case to the original panel, and it is difficult to see how petitioners can have a "clear and indisputable" right to two mutually exclusive outcomes.

a. With respect to the course they principally endorse (a remand for proceedings before the three-judge panel), petitioners propose three different mechanisms, based on shifting and unpersuasive rationales. First, they contend that the court of appeals was obligated to vacate its valid order granting rehearing en banc. Their only authority for that result is the assertion that, "if [the majority] had the authority to dismiss the entire appeal, then they should have had the authority to vacate the order granting en banc rehearing." Pet. 29. But the implication petitioners would draw is inconsistent with the venerable principle that dismissing a case does not require a court to exercise judicial power. See, *e.g.*, *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)

("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.").[7] Thus, the "power" to dismiss a case cannot be bootstrapped into the power to vacate a valid order.

Second, petitioners maintain in the alternative that there was in fact no need for the en banc court to vacate the order granting rehearing, because Fifth Circuit Rule 41.3 is "not consistent with the U.S. Constitution, 28 U.S.C. § 1291, and Fed. R. App. P. 3-4," and therefore the panel's original decision has not actually been vacated. Pet. 30. And, offering yet a third alternative, petitioners contend that the Fifth Circuit was obliged to "suspend Local Rule 41.3" in this case by exercising its power under Rule 2 of the Federal Rules of Appellate Procedure "to suspend local rules." Pet. 31. Petitioners' second and third proposed mechanisms for returning the case to the original three-judge panel turn upon their erroneous claim (Pet. 6) that the dismissal of their appeal violated their "statutory and constitutional right to have their appeal decided."

b. The dismissal of petitioners' appeal did not violate constitutional principles of equal protection or the statutory provision of appellate jurisdiction in 28 U.S.C. 1291.

Petitioners argue that "[f]ederal courts have an absolute duty to exercise jurisdiction once it has been conferred." Pet. 14; see also Pet. 15 n.24 (citing 28 U.S.C. 1291; Fed. R. App. P. 3, 4).[8] But the court of appeals did

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[7] For the same reason, petitioners err when they contend that "[i]f the Fifth Circuit lacked an en banc quorum, then the five judge ad hoc group could not *sua sponte* issue dismissal orders." Pet. 19.

[8] Petitioners' statement of such a sweeping legal principle is wrong. As this Court has held, the duty to exercise jurisdiction "is not * * * absolute." *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716 (1996).

not simply decline to exercise its jurisdiction over their appeal. To the contrary, the earlier panel heard and decided petitioners' appeal from the district court's final judgment, the en banc court considered and granted respondents' petition for rehearing en banc, and the en banc court considered various alternatives to determine whether it had a quorum or could obtain one.

This is thus not a case concerning a court's discretionary decision to decline to exercise jurisdiction. Nor is the proper role of 28 U.S.C. 1291 an issue. Petitioners exercised their right to appeal the district court's judgment. But a right to appeal does not necessarily entail a right to a decision on the merits. As noted above, dismissal of an appeal is indisputably proper when a court lacks authority to act, such as where a plaintiff lacks standing or where a party appeals an interlocutory order that does not come within an exception to the final-order requirement or where a case has become moot.

Instead, the dispute here arises out of the proper construction of federal rules and statutes. The court of appeals concluded that it lacked authority to proceed with the merits of the appeal due to its interpretation of the statutory quorum requirement, and that it could take no further action other than dismissing the appeal. If the court was correct that it lacked a quorum, and it was thus unable to issue a decision on the merits of the appeal, nothing in the Constitution or any federal statute prohibited its order of dismissal. But even if the court misinterpreted those authorities, that conclusion on its own terms does not implicate any right to an appellate decision grounded in a rule, statute, or constitutional guarantee. Nor, in any event, would mere legal error suffice to require mandamus relief. See, *e.g.*, *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 27 (1943)

(finding mandamus relief unwarranted when lower court's "decision, even if erroneous[,] * * * involved no abuse of judicial power, and any error which it may have committed is reviewable by [direct appeal and then certiorari]").

As the constitutional basis for their claim, petitioners contend (Pet. 16) that the equal-protection component of the Fifth Amendment prohibited the court of appeals from dismissing their appeal. But petitioners are not members of a protected class, and they cannot claim a violation of any constitutionally protected right. They are accordingly not entitled to heightened scrutiny. The Fifth Circuit's rationale was plainly sufficient to survive rational-basis review.

In alleging that they received unequal treatment, petitioners contend (Pet. 16 & n.29) that "the panel decision would not have been vacated" if their suit had been pending in one of the eight circuits that have not adopted a local rule similar to Fifth Circuit Rule 41.3. Their focus on Rule 41.3, however, is unwarranted, because it establishes only a default option (*i.e.*, that the panel's decision will typically be vacated when rehearing en banc is granted). Even in the absence of the rule, the en banc court could have expressly provided that the panel's decision was vacated when it granted rehearing and assumed control over the case under Section 46(c). Indeed, that was the "long-standing practice" that was codified by Rule 41.3's predecessor in 1978, see *United States* v. *Gutierrez-Barron*, 602 F.2d 722, 723 (5th Cir.), cert. denied, 444 U.S. 983 (1979). More importantly, a similar procedure can be, and often is, followed in nearly all of the circuits that lack the "automatic[]" rule that

petitioners malign (Pet. 16).[9] There is thus no basis to conclude that petitioners have suffered any discrimination on account of where they filed their appeal. And to the extent that another court might follow a different procedure, Congress has long authorized every federal court to adopt its own rules of procedure (see 28 U.S.C. 2071; Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 83), so a mere difference in the rules of particular courts does not violate equal-protection principles.

c. Petitioners' proposed fallback approach—allowing the Fifth Circuit "to wait until a new judge is confirmed to see if the en banc court can act," Pet. 32-33—poses different problems. Although petitioners say that "[t]he parties briefed the possible solution of placing the case on a special docket to wait until a new judge could be confirmed," Pet. 31, they do not acknowledge that

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[9] See, *e.g.*, 1st Cir. Internal Operating Procedures (I.O.P.) X.D ("Usually when an en banc rehearing is granted, the previous opinion and judgment will be vacated."); 3d Cir. I.O.P. 9.5.9 ("[T]he chief judge enters an order which grants rehearing * * * [and] vacates the panel's opinion in full or in part and the judgment entered thereon."); 7th Cir. I.O.P. 5(e) ("An order granting rehearing en banc should specifically state that the original panel's decision is thereby vacated."); *Nelson* v. *Correctional Med. Servs.*, 583 F.3d 522, 525 (8th Cir. 2009) (noting the court granted a "petition for rehearing en banc and vacated the panel opinion"); D.C. Cir. R. 35(d) ("If rehearing en banc is granted, the panel's judgment, but ordinarily not its opinion, will be vacated."); *Princo Corp.* v. *International Trade Comm'n*, 583 F.3d 1380, 1380-1381 (Fed. Cir. 2009) (order granting petitions for rehearing en banc and vacating panel opinion); see also *Animal Legal Def. Fund* v. *Veneman*, 490 F.3d 725, 728 (9th Cir. 2007) (Bybee, J., concurring) (explaining that the Ninth Circuit treats a panel opinion as "not precedential" from the time rehearing is granted, but it no longer follows the "widely accepted practice" of "formally vacat[ing]" the panel opinion when granting rehearing en banc, because that could cause West to omit the panel's opinion from the *Federal Reporter*).

their contribution to the "brief[ing]" of that possibility was to urge the court of appeals against using it. See Pet. C.A. Letter Br. 10 ("[T]he step of putting the case in a special docket [to see if a quorum could later be obtained] as was done in *North American Co.* [v. *SEC*, 320 U.S. 708 (1943),] is simply not required, and in effect gives [respondents] a right of en banc review when no such right exists."). Petitioners cannot plausibly claim that they now have a "clear and indisputable" right to an order compelling the court of appeals to do something they previously argued it should not do. Cf. *Whitehouse* v. *Illinois Cent. R.R. Co.*, 349 U.S. 366, 373 (1955) (noting that "mandamus is itself governed by equitable considerations and is to be granted only in the exercise of sound discretion").

Moreover, to the extent petitioners admit that further proceedings before the en banc court could prevent their appeal from being dismissed, they have not explained why the acting chief judge could not have requested, pursuant to 28 U.S.C. 291(a), that the Chief Justice "designate and assign temporarily" one or more judges from another circuit to "act as circuit judge" in this case. The terms of Section 291(a) do not limit that authority to three-judge panels, as opposed to en banc courts. Instead, the statute authorizes the Chief Justice to make an assignment when it is "in the public interest." *Ibid.* Petitioners suggest (Pet. 33) that such assignments "violate[] separation of powers." But that objection has no merit, because the various circuits are creatures of statute, and the ability to perform out-of-circuit judicial work is inherent in the statutory definition of the offices to which circuit judges are confirmed and appointed. Out-of-circuit retired judges (and Justices) routinely sit by designation on court-of-appeals

panels pursuant to statutory authorization. See 28 U.S.C. 294(a) and (d); see also 28 U.S.C. 46(b) (authorizing a circuit's chief judge to waive the requirement that a majority of the judges on a three-judge panel be "judges of that court"). And Congress has specifically provided that Section 291 (and other provisions) may be used to "fill[]" the slots of disqualified circuit judges when this Court lacks a quorum and remits a case on direct appeal. 28 U.S.C. 2109; see *United States* v. *Will*, 449 U.S. 200, 212-213 & n.13 (1980) (recognizing that the provisions cross-referenced in Section 2109 are located at 28 U.S.C. 291-296).[10]

In any event, steps that would allow the en banc court to acquire a quorum by waiting for an additional judge or judges—either a new Presidential appointee or a temporary designee of the Chief Justice—are plainly discretionary. Mandamus relief would not be appropriate to compel the Fifth Circuit to take such steps in the absence of a clear and indisputable right to a particular course, which petitioners have not met their burden of demonstrating.

4. Even if petitioners were able to establish a clear and indisputable right to have their appeal reinstated before the court of appeals, they still have not satisfied the independent requirement that the extraordinary exercise of this Court's discretion associated with manda-

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[10] Nor does Fifth Circuit precedent foreclose the use of Section 291(a) in this context. See Pet. App. 3 (citing *United States* v. *Nixon*, 827 F.2d 1019 (5th Cir. 1987), cert. denied, 484 U.S. 1026 (1988)). In *Nixon*, the Fifth Circuit rejected the use of Section 291(a) at an earlier stage—when the court of appeals was considering whether to grant rehearing en banc. See *id.* at 1021-1022. Here, by contrast, a properly constituted en banc court voted to grant rehearing en banc in this case, making *Nixon*'s rationale (that only judges from within the circuit should make that decision) inapplicable.

mus be "appropriate under the circumstances." *Cheney*, 542 U.S. at 381. In the past, the Court has found such circumstances when a lower court was, for example, "threaten[ing] the separation of powers," or intruding on "a delicate area of federal-state relations," *ibid.* (citing cases), or failing to implement the mandate of this Court's decisions, see *Vendo Co.* v. *Lektro-Vend Corp.*, 434 U.S. 425, 427-428 (1978) (per curiam) (citing cases). This case does not present any similar judicial usurpation of power.

Petitioners contend (Pet. 24-25) that mandamus is "appropriate" because this case involves questions about judicial recusal. But of the 14 cases they cite to illustrate that contention (Pet. 24-25 nn.47-48), not one involved a grant of mandamus based on a conclusion that a lower court had (as alleged here) incorrectly *refrained* from proceeding in a case. Instead, each of the five cited cases in which mandamus relief was granted involved a determination by a court of appeals that a district judge (or special master) had erroneously refused to recuse and continued to sit improperly in a case. See *Cobell* v. *Norton*, 334 F.3d 1128, 1139 (D.C. Cir. 2003); *In re School Asbestos Litig.*, 977 F.2d 764, 775 (3d Cir. 1992); *In re Aetna Cas. & Sur. Co.*, 919 F.2d 1136, 1143 (6th Cir. 1990) (en banc); *In re Faulkner*, 856 F.2d 716, 721 (5th Cir. 1988); *United Family Life Ins. Co.* v. *Barrow*, 452 F.2d 997, 998 (10th Cir. 1971).

Petitioners suggest that the court of appeals usurped the power of the three-judge panel by "assum[ing] that once the en banc court voted to grant rehearing, the panel lost authority to act." Pet. 21. In petitioners' view, the panel "never actually lost" control of the case, and it thus "could have continued to exert the authority it never lost, and could have reheard the case based on

the new briefing, issuing a new decision or reinstating its previous decision." Pet. 21, 29. Petitioners argue that "no rule or law" deprived the panel of its authority to act. Pet. 21. But they overlook the applicable statutory provision, which provides that a case or controversy "shall be heard and determined by a court or panel of not more than three judges * * *, *unless a hearing or rehearing before the court in banc is ordered* by a majority of the circuit judges of the circuit who are in regular active service." 28 U.S.C. 46(c) (emphasis added).

Petitioners do not dispute the validity of the court of appeals' February 26, 2010 order (Pet. App. 46-48) that their case be reheard en banc. Nor could they dispute its validity in light of Rule 35(a) of the Federal Rules of Appellate Procedure, which expressly provides that rehearing en banc may be ordered by "[a] majority of the circuit judges who are in regular active service and who are not disqualified." Under the terms of Section 46(c)'s "unless" clause, that order granting rehearing meant that the case would no longer be "heard and determined" by the three-judge panel.[11]

At the very least, that aspect of Section 46(c) further confirms that petitioners have not established that they had any "clear and indisputable" right to have the three-judge panel continue to consider the case after rehearing was validly ordered.

5. As the foregoing demonstrates, even assuming that the en banc court lacked a quorum to proceed, peti-

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[11] Petitioners note (Pet. 28) that the Fifth Circuit's Internal Operating Procedures allowed the panel to "retain[] authority to act after the petition for rehearing en banc was *filed*" (emphasis added), but that provision does not address what was to happen after the petition was *granted*. Even if it did, it could not overcome the plain meaning of the "unless" clause in the first sentence of Section 46(c).

tioners have failed to establish that they have a clear and indisputable right to relief that they could not obtain through other means, in order to prevent the kind of judicial usurpation that would warrant mandamus from this Court. Nevertheless, petitioners' argument is further compromised by their assumption that the en banc court lost its quorum when there were only eight non-recused judges (out of 16 active judges). In fact, as respondents argued in their May 12, 2010 letter brief to the court of appeals (at 1-4), the assumption that eight judges did not constitute a quorum was based on a misinterpretation of the governing statute.

a. Petitioners—like most of the judges on the court of appeals—apparently assume, without analysis or citation of authority, that Section 46(d)'s quorum requirement refers to all active judges, including those who may be disqualified. See Pet. 34; Pet. App. 3-4 (majority opinion), *id.* at 6 (Davis, J., dissenting, joined by Stewart, J.); but see *id.* at 10, 14-16 (Dennis, J., dissenting). That assumption, however, does not reflect the best interpretation of the statutory language.

Congress has defined a quorum of a court of appeals in 28 U.S.C. 46(d): "A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum." Paragraph (c) of Section 46, in turn, provides: "A court in banc shall consist of all circuit judges in regular active service." 28 U.S.C. 46(c). Neither provision specifically addresses the treatment of active judges who are disqualified in a particular case. Thus, the statute is, at least initially, ambiguous with respect to the question here. In context, however, the better reading of Section 46 is that a case-specific inquiry should be used in determining whether a court of appeals has a quorum.

Section 46 is unusual in defining the size and quorum of a federal court of appeals. Unlike this Court (and many other bodies), the courts of appeals vary in their composition, not just from circuit to circuit and from case to case, but between a panel and an en banc court.[12] There is no minimum number of judges for a court of appeals, and Section 46 accounts for the fact that their composition necessarily changes as circumstances require. Under the first sentence of Section 46(c), "[c]ases and controversies shall be heard and determined by a court or panel of not more than three judges * * *, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service." 28 U.S.C. 46(c). The second sentence—"[a] court in banc shall consist of all circuit judges in regular active service"—defines the composition of "[a] court in banc" and necessarily corresponds to the same phrase in the preceding sentence.

The Fourth Circuit has adopted a case-specific approach to the reference in Section 46(c) to "all circuit judges in regular active service." See *Arnold* v. *Eastern Air Lines, Inc.*, 712 F.2d 899, 903-904 (1983) (Murnaghan, J., concerning grant of rehearing en banc) (under the statute, "there shall be excluded, for quorum ascertainment purposes, any disqualified judge when a vote on a suggestion for hearing or rehearing *en banc* takes

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[12] This Court's size and quorum requirements are absolute. See 28 U.S.C. 1 ("The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum."). Thus, the case specific interpretation of Section 46 advanced here would not apply to this Court's quorum requirement.

place"), cert. denied, 464 U.S. 1040 (1984).[13] *Arnold* recognized that a disqualified judge "is regular and active, and as a general proposition is in service," but concluded that such a judge "is *out of service* insofar as that particular case is concerned." *Id.* at 904; see also *ibid.* ("for the particular case, he was not one of the circuit judges in regular active service").

That case-specific interpretation of Section 46(c) is reflected in the 2005 amendment to Federal Rule of Appellate Procedure 35(a). That rule specifies that a court of appeals may grant rehearing en banc on the basis of an order issued by the "majority of the circuit judges who are in regular active service *and who are not disqualified*" (emphasis added). The recent amendment—which was adopted by this Court pursuant to 28 U.S.C. 2072, see *Amendments to Federal Rules of Appellate Procedure*, 544 U.S. 1151, 1160 (2005)—added the italicized phrase and "adopt[ed] the case majority approach as a uniform national interpretation of § 46(c)." 2005 Adv. Comm. Notes. Thus, Rule 35(a) excludes disqualified judges from the denominator when calculating a majority, even though the parallel text in the first sentence of Section 46(c) does not expressly exclude disqualified judges. As the Advisory Committee on Appellate Rules explained, there is a sound basis for that exclusion: "It is clear that 'all circuit judges in regular active service' in the second sentence does not include disqualified judges, as disqualified judges clearly cannot participate in a case being heard or reheard en banc." *Ibid.* And, the "two nearly identical phrases appearing" in the first and second sentences of Section 46(c) should be interpreted in the same way. *Ibid.*

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[13] Judge Murnaghan's opinion on this point was joined by five other judges, a majority of the en banc court. See 712 F.3d at 902.

That same principle should extend to the definition of a quorum in Section 46(d), which expressly refers to "the number of judges authorized to constitute a court * * *, *as provided in paragraph (c)*." 28 U.S.C. 46(d) (emphasis added). As the Fourth Circuit recognized in *Arnold*, and as Rule 35(a) now demonstrates, the key question in understanding the majority requirement in Section 46(c) is the composition of the en banc court in a particular case, not in the abstract. If a case-specific understanding prevails when determining whether a majority exists to grant rehearing en banc, a similar, case-specific understanding of the composition of the en banc court should apply when determining whether a quorum of the en banc court exists after rehearing en banc has been granted.[14]

b. Petitioners' rejection of the case-specific approach is unwarranted and would have anomalous consequences.

Petitioners suggest in passing (Pet. 34) that the case-specific approach would allow an en banc decision to be issued by too few judges. But Section 46(c) does not impose any minimum size for an en banc court. The First Circuit, for example, has held that an en banc

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[14] As discussed above (pp. 3-4, *supra*), the Advisory Committee stated that the 2005 amendment to Rule 35(a) was "not meant to alter or affect the quorum requirement of 28 U.S.C. § 46(d)," and the Committee left open "the possibility that § 46(d) might be read to require that more than half of all circuit judges in regular active service be eligible to participate in order for the court to hear or rehear a case en banc." 2005 Adv. Comm. Notes. Although such an interpretation is possible, it is not the better interpretation of the statute, which should be read consistently as a whole. Some circuits have adopted a different definition of a quorum by local rule. See 1st Cir. R. 35.0(a); 3d Cir. I.O.P. 9.5.3; Fed. Cir. R. 47.11. Because the Fifth Circuit has not done so, this case does not directly present the question whether such rules are valid.

court consisting of only three judges is permissible (at a time when that court had four authorized judgeships, and one was vacant). See *United States* v. *Martorano*, 620 F.2d 912, cert. denied, 449 U.S. 952 (1980). Similarly, Congress has authorized large circuits to use en banc panels comprising fewer than the full number of active, non-disqualified judges on the court. See Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1633 (cited in 28 U.S.C. 46(c)) ("Any court of appeals having more than 15 active judges * * * may perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals."). The Ninth Circuit routinely does so, pursuant to a rule that incorporates a case-specific understanding of the meaning of an "en banc court." See 9th Cir. R. 35-3 ("The en banc court, *for each case* * * *, shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court.") (emphasis added). That rule expressly excludes any disqualified judge from the 11-judge en banc court. *Ibid.* ("If a judge whose name is drawn for a particular en banc court is disqualified, recused, or knows that he or she will be unable to sit at the time and place designated for the en banc case or cases, the judge will immediately notify the Chief Judge who will direct the Clerk to draw a replacement judge by lot."). Under petitioners' reading, which includes active but disqualified judges among the members of the en banc court, the Ninth Circuit would presumably be required to seat en banc panels with fewer than 11 judges.

Petitioners' interpretation would also result in another anomaly by counting disqualified active judges in the denominator for quorum purposes but, at the same time, excluding vacancies among the authorized judge-

ships. Section 46(d) says nothing about active judges, whether or not disqualified. Instead, the statute refers to "the number of judges authorized to constitute a court." 28 U.S.C. 46(d). Read literally, and divorced from the case-specific language in the prior subsection, that could be understood to refer to the number of judges Congress has authorized to be appointed to the circuit. See 28 U.S.C. 44(a) (listing the number of judgeships for each circuit). The Fifth Circuit has 17 authorized judges, although two of those positions are currently vacant. See pp. 9-10, *supra*. Nevertheless, the Fifth Circuit does not require an absolute majority of all authorized judgeships when determining whether a quorum exists, or in the related identification of the denominator for determining a majority of active judges voting in favor of rehearing en banc.[15] The contrary reading would create unnecessary barriers to the functioning of an en banc court when a circuit has multiple vacancies.[16]

Under the case-specific approach, the quorum requirement in Section 46(d) was not a barrier to disposition of the case by an en banc court of eight judges.

6. Nevertheless, even if petitioners were correct in concluding that the court of appeals lacked a quorum to proceed en banc when eight of 16 active judges were

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[15] See *Variable Annuity Life Ins. Co.* v. *Clark*, 13 F.3d 833, 834 (5th Cir. 1994) (Smith, J., dissenting from denial of rehearing en banc) (not counting four vacancies); see also, *e.g.*, *Martorano*, 620 F.2d at 920 (1st Cir.) (two of three judges constitute a majority authorized to grant rehearing en banc, not counting one vacancy).

[16] Three of 13 authorized judgeships on the Second Circuit are currently vacant, as are two of 15 on the Fourth Circuit, two of 12 on the Tenth Circuit, and two of 11 on the D.C. Circuit. See pages available at United States Courts, *Court of Appeals—Detail*, http://www.uscourts.gov/uscourts/JudgesJudgeships/Vacancies/reports/jdarjdtl_appeals.html (last visited Nov. 29, 2010).

recused (see Pet. 17), that no longer appears to be true, even under petitioners' own reasoning. As noted above (see p. 9, *supra*), one of the previously recused judges on the court of appeals assumed senior status on September 30, 2010. Thus, assuming arguendo that Section 46(c) and (d) require an en banc court to include at least an absolute majority of the circuit's active judges—something that is by no means clear or indisputable—the eight judges who were not recused on May 28, 2010 would suffice to constitute a majority now that there are only 15 active judges on the court (assuming no intervening events have triggered an additional recusal).[17]

That development would make it particularly inappropriate for this Court to exercise its extraordinary power of mandamus to "vacate the order granting rehearing en banc and return the case to the three-judge panel to decide the appeal." Pet. 36. Similarly, although petitioners briefly mention the possibility that the court of appeals "may now have an en banc quorum," Pet. 35, they do so for a different reason (which is not borne out by the facts).[18] There is accordingly no reason for this

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[17] Because Judge Wiener did not participate when the court decided that the case should be reheard en banc, Pet. App. 47 n.1, and when it dismissed the appeal, *id.* at 2 n.*, he would not be "eligible * * * to *continue to participate* in the decision" as a senior circuit judge under 28 U.S.C. 46(c)(2) (emphasis added); see also 5th Cir. R. 35.6 ("Any judge participating in an en banc poll, hearing, or rehearing while in regular active service who subsequently takes senior status may elect to continue participating in the final resolution of the case.").

[18] Petitioners suggest that "[t]he Fifth Circuit may now have an en banc quorum given the recent judicial appointment." Pet. 35; see also Pet. 32 & n. 61 (noting that the President nominated James E. Graves, Jr., to fill a Fifth Circuit vacancy in June 2010). There has not, however, been any "appointment" to the Fifth Circuit since petitioners' appeal was dismissed.

Court to give petitioners the benefit of that recent development, especially because, as discussed above (see pp. 17-18, *supra*), they argued that the court of appeals should not wait to allow a quorum to be established by virtue of changed circumstances.

Accordingly, this Court should not grant petitioners' extraordinary request that it "issue a writ of mandamus directing [the court of appeals] to reinstate [p]etitioners' appeal and return it to the panel for final adjudication." Pet. 6.[19]

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[19] Petitioners mention, in a one-sentence footnote without citation, that "[t]his Court * * * has the authority to convert a Petition for a Writ of Mandamus to a Petition for Certiorari." Pet. 25 n.49. It is true that this Court has, in rare instances, treated a mandamus petition as one for certiorari. In such cases, the petitioners themselves have often welcomed that option. See *Collier* v. *United States*, 382 U.S. 890 (1965) (treating mandamus petition as certiorari petition, when petitioner was *pro se* and incarcerated; expressly sought "a mandamus or some other appropriate order," Pet. at 2, *Collier*, *supra*, (Nos. 331 and 695 Misc.); referred in his reply brief (at 1) to his "plea for certiorari"; and stated in his reply brief (at 2) that "[t]he petition for a writ of certiorari should be granted"). Cf. *Mandel* v. *En Banc Court of Appeals for the Fourth Circuit*, 445 U.S. 959 (1980) (No. 79-1028) (denying motion for leave to file petition for mandamus seeking to vacate an en banc court's order affirming petitioners' convictions on the basis of an evenly divided vote, and to reinstate the panel opinion that had previously vacated petitioners' convictions); *Mandel* v. *United States*, 445 U.S. 961 (1980) (No. 79-1029) (denying certiorari petition challenging, in the alternative, the same evenly-divided en-banc-court decision). But see *Calderon* v. *Thompson*, 521 U.S. 1136 (1997) (granting certiorari in response to mandamus petition that lacked any request for certiorari). Here, rather than embracing the certiorari option in the alternative, petitioners contend that "a Writ of Mandamus is the proper remedy in this case." Pet. 25 n.49.

CONCLUSION

The petition for a writ of mandamus should be denied.

Respectfully submitted.

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NOVEMBER 2010

Supreme Court, U.S.
FILED
NOV 29 2010
OFFICE OF THE CLERK

No. 10-294

IN THE

Supreme Court of the United States

IN RE: NED COMER; *et al.*,

Petitioners.

On Petition for a Writ of Mandamus to the United States Court of Appeals for the Fifth Circuit

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INTRODUCTION

Petitioners bring tort claims against selected oil, energy, chemical, and coal companies alleging the companies are liable for causing damage from Hurricane Katrina. With their claims dismissed by the district court as nonjusticiable political questions and for lack of standing, and their appeal dismissed by the Fifth Circuit because the *en banc* court concluded it had lost its quorum, petitioners ask this Court for a writ of mandamus sending this case back to the three-judge panel that is the only body saying their claims can proceed.

Rather than seek the conventional remedy of certiorari review of the merits of their claims, petitioners ask for the "drastic and extraordinary" remedy of mandamus. *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (quoting *Ex Parte Fahey*, 332 U.S. 258, 259-60 (1947)). Rather than ask for the case to be sent back to the *en banc* court for rehearing, petitioners ask to return to the panel that ruled in their favor.

Mandamus is available only when three requirements are met: (1) no other adequate means exist to attain the relief sought; (2) there is a "clear and indisputable" right to the writ; and (3) "the writ is appropriate under the circumstances." *Id.* at 380-81 (internal citations and quotations omitted). Petitioners do not and cannot meet these requirements.

Petitioners do not meet the first requirement because there are other avenues of relief. Petitioners could have sought certiorari review under Supreme Court Rule 10 of either the *en banc* Fifth Circuit's dismissal of their claims on procedural grounds or the district court's dismissal of their claims on the merits. They made a strategic decision to do neither.

Petitioners do not establish that their right to mandamus is "clear and indisputable." *Id.* at 381. The right to mandamus is not indisputable where it turns on an uncertain question of law. Petitioners assert this case is "unprecedented," which alone is fatal to meeting this requirement. Pet. 26. And, there is contrary authority directly supporting the *en banc* court's dismissal of the case in *Chrysler Corp. v. United States*, 314 U.S. 583 (1941) ("*Chrysler I*"), where this Court dismissed an appeal for lack of qualified Justices to constitute a quorum. The right to mandamus is likewise not clear when the conduct at issue is a matter of discretion, unless there is a clear and indisputable abuse of discretion. The Fifth Circuit did not abuse its discretion in applying its local rules to vacate the panel decision and in dismissing the appeal below. Its decision to dismiss is also fully supported by this Court's precedent.

Petitioners fail to show that mandamus is appropriate under the circumstances here where they have taken self-contradictory positions unsupported by law regarding the authority of the *en banc* court and the panel. Petitioners acknowledge that when the *en banc* court granted rehearing, Fifth Circuit Rule 41.3 automatically vacated the panel opinion. Pet. 30. At the same time, they argue that Rule 41.3 never stripped the three-judge panel of its authority to take "necessary action," including to

rehear the case or reinstate its original decision. Pet. 21. These two positions cannot be squared. Likewise, petitioners' position that the *en banc* court lost its quorum after granting rehearing, and therefore the authority to act (Pet. 17), is inconsistent with their position that the *en banc* court retained the authority to suspend Rule 41.3 and return the case to the panel. Pet. 31.

In asking the Court to return the case to the three-judge panel, petitioners omit that the *en banc* court had several alternative options for proceeding. Those options include invoking the Rule of Necessity to set aside disqualifications, assigning an active circuit judge from another circuit, or staying the case until a quorum is restored.

The Court should not convert the petition to one for certiorari. Petitioners have expressly disavowed an interest in certiorari relief. They made the strategic decision not to seek certiorari review of the procedural ruling or the merits of their claims and should be held to that decision. Further, the petition fails the test for certiorari review because the Fifth Circuit's decision is fully consistent with *Chrysler I* and does not conflict with decisions in other circuits.

STATEMENT

1. On September 20, 2005, shortly after Hurricane Katrina, petitioners brought suit in federal court. Pet. 9. The operative Third Amended Complaint alleges state law claims against respondents for public and private nuisance, trespass, negligence, unjust enrichment, and fraud on behalf of a putative class of Mississippi residents and property owners. Record ("R.") 761-64.

The claims are premised on the following theorized chain of causation: (1) respondents' lawful

conduct resulted ultimately in greenhouse gas emissions over many decades; (2) which, coupled with the emissions of untold billions of other companies, individuals and other actors worldwide, contributed to alleged global warming; (3) which in turn caused ocean and air temperatures to rise; (4) which in turn increased the possibility and intensity of hurricanes forming in the Atlantic Ocean; (5) which in turn contributed to Hurricane Katrina's intensity by some unspecified degree; and (6) which increased intensity ultimately caused petitioners to suffer alleged unspecified injuries, including damage to unspecified properties in Mississippi. R. 748-53, 755-56.

2. On August 30, 2007, the district court dismissed petitioners' claims for lack of subject matter jurisdiction, holding the claims nonjusticiable under the political question doctrine because they asked the district court "to balance economic, environmental, foreign policy, and national security interest[s] and make an initial policy determination of a kind which is clearly nonjudicial." Transcript of Aug. 30, 2007 Hearing on Coal Company Defendants' Motion to Dismiss at 40. The district court also found that petitioners lacked Article III standing, reasoning that their alleged injuries were not "fairly attributable to these individual defendants" but instead were "attributable to a larger group that are [sic] not before this Court, not only within this nation but outside of our jurisdictional boundaries as well." *Id.* at 36. On October 16, 2009, a three-judge panel of the Fifth Court reversed in part, concluding that petitioners had standing to assert their claims of public and private nuisance, trespass, and negligence, and that these claims did not present nonjusticiable political questions. *Comer v. Murphy Oil USA*, 585 F.3d 855,

860 (5th Cir. 2009) ("*Comer I*").[1] Judge Davis specially concurred, joining the panel's ruling on standing and its outcome on the political question doctrine but indicating that he would have affirmed the district court's dismissal on the alternative ground that petitioners had failed to state a claim under common law because they failed "to allege facts that could establish that the [respondents'] actions were a proximate cause of the [petitioners'] alleged injuries." *Id.* at 880.

3. Respondents petitioned for rehearing *en banc*. On February 26, 2010, the Fifth Circuit issued an order stating that "a majority of the circuit court judges in regular active service and not disqualified voted in favor" of granting respondents' petitions. *Comer v. Murphy Oil USA*, 598 F.3d 208, 210 (5th Cir. 2010). The order noted that seven of the court's 16 active judges were recused and did not participate. *Id.* at 210 n.1. By operation of Fifth Circuit Rule 41.3, because the order granting *en banc* review did not provide otherwise, the order vacated the panel's opinion and stayed the mandate.

4. On April 30, 2010, the clerk of the Fifth Circuit notified the parties that since the time the *en banc* court was constituted new circumstances had arisen requiring another judge to recuse, leaving only eight members of the court able to participate in the case and thereby causing the *en banc* court to conclude it had lost its quorum and was

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[1] The panel dismissed on prudential standing grounds petitioners' claims for unjust enrichment, fraudulent misrepresentation, and civil conspiracy, finding that they raised "a generalized grievance" shared by "the American public." *Comer I*, 585 F.3d at 868.

"preclude[ed] . . . from acting on the merits of the case." Letter of Fifth Circuit Office of the Clerk at 1, *Comer v. Murphy Oil USA*, No. 07-60756 (5th Cir. April 30, 2010). On May 6, 2010, the clerk of the court requested that the parties submit letter briefs addressing how the court should proceed. Pet. App. 44. The court directed the parties to several rules, statutes, and cases, but invited them to "address the matter as they think appropriate." *Id.*

Respondents maintained that the *en banc* court still had a quorum, but that, even if it did not, the court had several options for proceeding, including requesting the appointment of an active judge from another circuit to serve on the *en banc* court and invoking the Rule of Necessity to disregard disqualifications. Resp. C.A. Letter Br. 1-11. Respondents argued in the alternative that if the court rejected all of these options, the proper result, under *Chrysler I*, would be to dismiss the appeal and leave the district court's decision intact. *Id.* at 12. Petitioners took a starkly different position—that the court had only one option, to return the case to the three-judge panel that had ruled in their favor. Pet. C.A. Letter Br. 1-12.

5. On May 28, 2010, five of the eight remaining non-recused judges of the *en banc* court issued a *per curiam* order stating that because the court had concluded it lacked a quorum, it could not conduct judicial business with respect to petitioners' appeal. It directed the clerk to dismiss the appeal. *Comer v. Murphy Oil USA*, 607 F.3d 1049, 1055 (5th Cir. 2010) ("*Comer II*"). The order addressed and rejected several options proffered by respondents and noted the absence of any rule enabling the *en banc* court to reinstate the vacated panel opinion. *Id.*

Judge Davis dissented, joined by Judge Stewart, maintaining that dismissal was inappropriate and that the *en banc* court should have requested appointment of a judge from another circuit to enable the court to consider the case *en banc*. *Id.* at 1056. Judge Dennis separately dissented, disagreeing with the majority's view that it did not have a quorum, insisting that the court had a categorical duty to decide the case, and asserting that the *en banc* court should have applied the Rule of Necessity, requested appointment of a judge from another circuit, or held the case over until such time as the *en banc* court had a quorum *Id.* at 1058-66.

ARGUMENT

I. There Is No Basis For The Extraordinary Remedy Of Mandamus.

Mandamus is rarely to be granted because it "is a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney*, 542 U.S. at 380 (quoting *Ex Parte Fahey*, 332 U.S. 258, 259-60 (1947)); Sup. Ct. R. 20.1 (noting that extraordinary writs are "not a matter of right, but of discretion sparingly exercised"). To obtain mandamus three requirements must be met: (1) "no other adequate means [exist] to attain the relief"; (2) the "right to issuance of the writ is clear and indisputable"; and (3) "the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 380-81 (internal citations and quotations omitted). Petitioners meet none of these requirements.

A. Petitioners Do Not Establish That There Are No Other Adequate Means For Relief.

1. There Are Other Avenues Of Relief.

The rule barring mandamus where alternative relief is available is "designed to ensure that the writ will not be used as a substitute for the regular appeals process." *Id. at* 380-81; *see also Will v. United States*, 389 U.S. 90, 97 (1967) ("Mandamus, of course, may never be employed as a substitute for appeal . . . ."). This rule applies where, as here, a party is able to seek certiorari review, whether it sought that review or not. *See In re Nat'l Park Bank of N.Y.*, 256 U.S. 131, 133 (1921) (denying writ of mandamus to compel Fifth Circuit to modify its final ruling where party could have sought certiorari review); Sup. Ct. R. 20.1 (to justify the granting of any extraordinary writ, "the petition must show . . . that adequate relief cannot be obtained in any other form.").

Petitioners had at least two other avenues of relief, but made a strategic decision to pursue neither. They could have sought certiorari review of the decision of the Fifth Circuit to dismiss on procedural grounds for lack of a quorum. *See United States v. Am.-Foreign Steamship Corp.*, 363 U.S. 685, 685-86 (1960) (determination of whether *en banc* court was properly constituted subject to certiorari review). They also could have sought certiorari review of the merits decision of the district court. Because there were other adequate means of relief, mandamus is not warranted. *See In re Nat'l Park Bank of N.Y.*, 256 U.S. at 133.

2. Petitioners' Contrary Arguments Are Without Merit.

Petitioners' argument that Supreme Court Rule 10 bars certiorari review of cases "for which the court of appeals did not reach a decision" is unfounded. Pet. 23. Rule 10 merely sets forth "[c]onsiderations [g]overning [r]eview on [c]ertiorari" and emphasizes that the circumstances listed are "neither controlling nor fully measuring the Court's discretion" to grant review. Sup. Ct. R. 10. The Court in fact is empowered to review a case at any time "before judgment has been rendered in the court of appeals," and has done so before. 28 U.S.C. § 2101(e); Sup. Ct. R. 11; *see also United States v. Nixon*, 418 U.S. 683, 690-92 (1974) (directly reviewing final order of district court). It could have done so here.

Petitioners' argument that mandamus is necessary to correct the *en banc* court's purported "failure to exercise jurisdiction," also misses the mark.[2] Pet. 24. This case is not about the exercise of jurisdiction. The authority of circuit courts to adjudicate cases is subject not only to jurisdictional requirements but also to 28 U.S.C. § 46, which governs the composition and number of appellate judges necessary to render a decision. *See Nguyen v. United States*, 539 U.S. 69, 80-82 (2003). In *Nguyen*, this Court held that an improperly constituted appellate panel had no authority to render a decision, even though there was no quarrel over

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[2] Petitioners also half-heartedly suggest that "[r]ecusals are a particularly proper issue for mandamus consideration" (Pet. 24), but then challenge none of the recusal decisions made in the court below. *See id.* at 35.

subject matter or personal jurisdiction in that case. *See id.*; *see also Am.-Foreign Steamship*, 363 U.S. at 691 (vacating judgment by improperly constituted *en banc* panel under 28 U.S.C. § 46, without reaching issue of jurisdiction). Likewise, the *en banc* court here never addressed the issues of subject matter or personal jurisdiction. Instead, following *Nguyen*, it determined that it lacked the quorum necessary to render a binding decision, as required under 28 U.S.C. § 46. *Comer II*, 607 F.3d at 1054-55.

Petitioners further argue that mandamus is appropriate where a court concludes that it cannot adjudicate the merits of an appeal without a properly constituted panel. Yet their authorities—*Cheney*, 542 U.S. at 372; *Will*, 389 U.S. at 95; *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)—undercut this position. None of those decisions granted mandamus, and all reiterated the well-settled rule that mandamus may not be employed as a substitute for appeal. *See Cheney*, 542 U.S. at 380-81; *Will*, 389 U.S. at 97; *Holland*, 346 U.S. at 383; *Roche*, 319 U.S. at 27-28.

B. Petitioners Do Not Establish Their Right To Mandamus Is "Clear And Indisputable."

Petitioners cannot meet the requirement of a "clear and indisputable" right to mandamus for several reasons.

1. The Petition Presents An Uncertain Issue Of Law.

A right to mandamus is not "clear and indisputable" where it turns on an uncertain issue of law. *See In re Hussein Lufti Bey*, 256 U.S. 616, 619 (1921) (denying writ of mandamus because the case

involved a novel issue of admiralty law where jurisdiction was "not plain but debatable"). Petitioners assert that "this case is unprecedented" and that they "could find no similar instance where a court of appeals utterly refused to hear an appeal of right." Pet. 26. In doing so, petitioners effectively concede that their petition asserts an uncertain issue of law inappropriate for mandamus relief. *See In re Hussein Lufti Bey*, 256 U.S. at 619.

Further, there is persuasive authority contrary to petitioners' assertion of "clarity." In *Chrysler I*, 314 U.S. at 583, the Court ordered that a direct appeal of right "be dismissed for want of a quorum of Justices qualified to sit in it." Petitioners argued *Chrysler I* before the *en banc* court, explaining:

> [*Chrysler I*] involved a direct appeal from the district court to the Supreme Court as allowed for the speedy adjudication of certain equity actions under the Anti-Trust Act. As such, the Supreme Court was the only court to which the aggrieved party could appeal.

Pet. C.A. Letter Br. 11; *see also Chrysler Corp. v. United States*, 316 U.S. 556, 559-60 (1942) ("*Chrysler II*") (explaining procedural history of *Chrysler I*). Tellingly, petitioners' mandamus petition does not even mention *Chrysler I*.

Petitioners' concession below—that under *Chrysler I* a court lacking a quorum may dismiss an appeal and leave the district court judgment intact—dispels any notion that the law is settled in their favor. It also dispels any notion that the *en banc* court's dismissal of their appeal was incorrect under the law. Under these circumstances, petitioners

cannot establish that their right to mandamus relief is "clear and indisputable."[3]

2. The *En Banc* Fifth Circuit Did Not Abuse Its Discretion.

Mandamus is not "clear and indisputable" where the conduct complained of is a matter of discretion, unless there is an abuse of discretion. *See, e.g.*, *United States ex rel. McLennon v. Wilbur*, 283 U.S. 414, 420 (1931). Petitioners contend that the court below "abused its discretion" in interpreting and following its local rules on *en banc* proceedings. *See* Pet. 21, 27-29. But appellate courts are free to devise their own local rules governing procedures for *en banc* proceedings. *Am.-Foreign Steamship*, 363 U.S. at 688; *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 250, 257 (1953). This Court has instructed that "[t]he interpretation of [a] local rule . . . is a matter on which we should defer to [courts of appeal]." *Henderson v. United States*, 476 U.S. 321, 328 n.9 (1986). Petitioners do not and cannot contend that the *en banc* court arbitrarily ignored or misinterpreted Fifth Circuit Rule 41.3, which states plainly that "the granting of a rehearing *en banc*

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[3] After *Chrysler I*, Congress enacted a general statute for the disposition of direct appeals to this Court when a quorum is lacking, which permits the Chief Justice to remit the matter to the court of appeals to be heard by an *en banc* panel or a special panel of the three most senior judges. 28 U.S.C. § 2109. There is no similar statute for *en banc* courts of appeal confronted with a lack of quorum, and thus *Chrysler I* remains instructive as to the proper procedure in the absence of such a statute.

vacates the panel opinion and judgment of the court and stays the mandate." 5th Cir. R. 41.3.[4]

The action of the *en banc* court dismissing petitioners' appeal for lack of a quorum was the proper course of action and is consistent with *Chrysler I*. It was not a clear and indisputable abuse of discretion.

3. Petitioners' Constitutional And Statutory Arguments Lack Merit.

Petitioners maintain that the *en banc* court's proper application of Rule 41.3 was nonetheless an abuse of discretion because it purportedly deprived them of a constitutional right to an appeal. Pet. 15-17, 30. But "[i]t is well settled that there is no constitutional right to an appeal." *Abney v. U. S.* 431 U.S. 651, 656 (1977); *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996). Likewise, "as frequently determined by this [C]ourt, the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance." *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 80 (1930); *see also, e.g., McKane v. Durston*, 153 U.S. 684, 687 (1894) (the right to appeal is not a "necessary element of due process of law"). Petitioners do not contend that they were denied due process rights in the district court proceedings.

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[4] As petitioners note, Fifth Circuit Rule 41.3 is consistent with the local rules of the Fourth, Fifth, Sixth and Eleventh Circuits. Pet. 16 n.29. It is also consistent with the internal operating procedures of the D.C., First, Third and Seventh Circuits. *See* D.C. Cir. Handbook of Practice and Internal Procedures, XIII(B)(2); First Cir. IOP, X(D); Third Cir. IOP 9.5.9; Seventh Cir. IOP 5(e).

Equally unavailing is petitioners' assertion that Rule 41.3 denies equal protection to litigants in the Fifth Circuit by automatically vacating panel decisions when a request for an *en banc* rehearing is granted. Pet. 16. Rule 41.3 is neutral on its face; petitioners concede the rational purpose for the rule; and they do not contend that it is administered in a discriminatory way against any class of person. *See* Pet. 30. "General rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with" the Equal Protection Clause of the Fourteenth Amendment. *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979). Dissatisfaction with a neutral application of a local rule does not amount to unequal treatment. "[T]he Fourteenth Amendment guarantees equal laws, not equal results." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979).

Finally, petitioners contend that the dismissal below denied them their statutory right of appeal under 28 U.S.C. § 1291. Pet. 15, 24. This argument fails because any wound petitioners have suffered is self-inflicted; petitioners made the strategic choice not to seek certiorari review. *See In re Nat'l Park Bank of New York*, 256 U.S. at 133. And, as *Chrysler I* shows, any right to appeal under 28 U.S.C. § 1291 is subject to all other laws governing the judiciary's authority to hear and decide appeals, including laws governing the composition of an *en banc* court. *See Chrysler I*, 314 U.S. at 583. A statutory right of appeal cannot confer authority on the courts where none exists.

C. Petitioners Do Not Establish That Mandamus Is Appropriate Under The Circumstances.

Petitioners assert that the circumstances of this case are "extraordinary" because the *en banc* court "abrogated its duty to the litigants" when it applied its own local rule and dismissed their claims.[5] *See* Pet. 25. But petitioners agree with the *en banc* court on the two key legal principles that compelled dismissal of their appeal. By petitioners' own account, Fifth Circuit Rule 41.3 "automatically 'vacate[d] the panel opinion and judgment of the court.'" Pet. 30 (quoting 5th Cir. R. 41.3). Petitioners likewise concede that after the panel's decision was vacated, "[t]he *en banc* court lacked a quorum, and therefore lacked the authority to act." Pet. 17. The *en banc* court agreed with petitioners on both points in dismissing their appeal. *See Comer II*, 607 F.3d at 1053-54. Petitioners now take a self-contradictory position against that outcome, which is unsupported by law.

Petitioners contend that because the *en banc* court lost its quorum, it lacked authority to do *anything*, including to dismiss their case. Pet. 17. This Court held otherwise in *Chrysler I*, where, as petitioners conceded below, this Court dismissed for

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[5] Petitioners also suggest, without authority, that the purported publicity surrounding this case makes this case "extraordinary" for purposes of the mandamus standard. Pet. 26. Whether to issue a writ of mandamus is a decision governed by the rule of law, not a rule of publicity. *Cf. Cheney*, 542 U.S. at 372, 390-91 (declining request for writ of mandamus to modify or dissolve trial court's discovery orders in suit against the Vice President and a national energy policy group established by the President).

a lack of a quorum of qualified Justices.[6] *Chrysler I*, 314 U.S. at 583.

Petitioners also maintain that although the *en banc* court had no authority to act once it lost its quorum, the application of Rule 41.3 never stripped the three-judge panel of the "authority to take necessary action," including authority to rehear the case or to reinstate its original opinion. Pet. 21. The panel's power to adjudicate the case is not governed by Rule 41.3, however, but by 28 U.S.C. § 46(c), which provides that cases on appeal

> shall be heard and determined by a court or panel of not more than three judges . . . *unless* a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service.

28 U.S.C. § 46(c) (emphasis added). Circuit courts construe the plain terms of this statute to mean that when a "rehearing before the court *en banc* is ordered," the three-judge panel is no longer authorized to "hear[] and determine[]" a case. *Id.*; *see also Cooey v. Bradshaw*, 338 F.3d 615, 616 (6th Cir. 2003) (*en banc*) (Clay, J., concurring) (authority of panel superseded by *en banc* court); *accord Summerlin v. Stewart*, 309 F.3d 1193, 1193 (9th Cir. 2002) ("When a case is heard or reheard *en banc*, the *en banc* panel assumes jurisdiction over the entire

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[6] Petitioners also argue that the power of courts to dismiss is limited by Federal Rules of Appellate Procedure 3 and 4. Pet. 20. While those rules, which govern when and how appeals are taken, permit dismissal on certain procedural grounds, they do not purport to provide an exhaustive list of grounds for dismissal. *See* Fed. R. App. P. 3, 4.

case."). There is no authority for the proposition that once an *en banc* court is formed, the three-judge panel retains separate, concurrent authority over the disposition of the appeal. Indeed, Judge Dennis, who dissented from the *en banc* order below, rejected petitioners' theory. *Comer II*, 607 F.3d at 1061 (Dennis, J., dissenting) ("[T]he *en banc* court, rather than the panel, has control over the case . . . .").

Petitioners urge finally that the *en banc* court should have exercised its discretion to suspend Rule 41.3 pursuant to Rule 2 of the Federal Rules of Appellate Procedure. Pet. 31. Yet that argument is inconsistent with petitioners' separate assertion that the *en banc* panel lacked authority to take any action at all. Pet. 17. Petitioners' argument is also wrong for two reasons.

First, the panel opinion had already been vacated by operation of Rule 41.3 by the time the *en banc* panel considered the quorum issue, so "suspending" Rule 41.3 at that point would have had no effect. The only way the *en banc* court could have reinstated the panel opinion was by affirmatively voting to do so—a judgment that would have required a quorum.

Second, the language of Rule 2 refers only to suspension of "these rules"—*i.e.*, the Federal Rules of Appellate Procedure. Petitioners point to no authority indicating that the phrase "these rules" in Rule 2 encompasses circuit court local rules, and none can be found.

II. There Are Options For Restoring A Quorum And Allowing The *En Banc* Court To Address The Merits.

Once the *en banc* court concluded that it had lost its quorum, dismissal of the appeal was both proper

and consistent with *Chrysler I*. There are, however, other alternative options for proceeding before the *en banc* court, all of which preclude the specific relief petitioners seek—returning the case to the three-judge panel.

American-Foreign Steamship, where a decision of a three-judge panel of the Second Circuit upholding a lower court's dismissal was withdrawn after an *en banc* rehearing, is instructive here. *Am.-Foreign Steamship*, 363 U.S. at 686-87. At issue before this Court was whether the participation of an ineligible judge deprived the *en banc* court of authority to adjudicate the matter and replace the panel's decision with its own. *Id.* at 686. Upon concluding that the *en banc* court lacked such authority, the Court did not reinstate the original panel—as petitioners request here—but instead remanded the matter to the *en banc* court for further proceedings by a properly constituted court. *Id.* at 691; *see also Am.-Foreign Steamship v. United States*, 291 F.2d 598 (2d Cir. 1961) (on remand, reconvening *en banc* court to address merits).

Likewise, there are several viable options here for satisfying the quorum requirement and permitting the *en banc* court to decide the merits of the case.[7] Petitioners cite no authority for reinstating the appeal and returning it to the

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[7] On September 30, 2010, Judge Jacques J. Wiener, Jr. took senior status. As a result, it appears that the *en banc* court currently consists of 15 circuit judges in regular active service and has a quorum of eight non-recused judges in regular active service available to adjudicate the appeal under both the *en banc* court's and the petitioners' interpretations of § 46(d)'s quorum requirement. *See Comer II*, 607 F.3d at 1054; Pet. C.A. Letter Br. 2-3.

original three-judge panel for final adjudication, and they concede that such an order is unnecessary if the *en banc* court satisfies the quorum requirement. *See* Pet. 36 ("*If* the Fifth Circuit still lacks a quorum to rehear the case en banc, then petitioners ask this Court to order the Fifth Circuit to . . . return the case to the three-judge panel to decide the appeal.") (emphasis added).

A. A Quorum May Be Achieved By Invoking The Rule Of Necessity.

One option for resolving the lack of a quorum is to invoke the "ancient Rule of Necessity." *United States v. Will*, 449 U.S. 200, 212 (1980). Under this long-settled rule of practice, a judge who is disqualified must nonetheless participate in the decision of the case "if it cannot be heard otherwise." *Id.* at 213 (quoting F. Pollack, A First Book of Jurisprudence 270 (6th ed. 1929)).

The *en banc* court declined to adopt this rule because it deemed it inappropriate to disregard disqualification of recused judges given that petitioners might eventually present the matter to this Court. *Comer II*, 607 F.2d at 1055. But the same could be said of virtually any federal appellate proceedings. If such an approach were accepted, it would effectively abolish the use of the Rule of Necessity in the circuit courts of appeal even though this Court has never indicated that its use is confined to the district courts.

The *en banc* court also declined to invoke the Rule of Necessity because there is no fixed method for selecting one particular judge among the several disqualified judges. *Id.* Other courts faced with similar circumstances, however, have exercised their discretion to fashion appropriate solutions to fit the

circumstances. Some courts, for instance, have allowed the most compelling grounds for recusal to stand while setting aside recusals based on other grounds. *See Bolin v. Story*, 225 F.3d 1234, 1239 (11th Cir. 2000) (where plaintiff sued all judges of the court save one, applying Rule of Necessity to set aside recusals only of judges who had not been involved in plaintiff's prior appeals). Others have set aside all disqualifications. *See In re Wireless Tel. Radio Frequency Emissions Prods. Liability Litig.*, 170 F. Supp. 2d 1356, 1358 n.4 (J.P.M.L. 2001). There is no reason to conclude that the *en banc* court cannot exercise its discretion to devise a fair and rational method of applying the Rule of Necessity here.

Petitioners assert that the Rule of Necessity is barred by the "strict" provisions of 28 U.S.C. § 455. Pet. 35. That notion is flatly contradicted by *Will*, which specifically held that the Rule of Necessity may be invoked to override § 455. *Id.* at 217 ("We therefore hold that § 455 was not intended by Congress to alter the time-honored Rule of Necessity."). Equally unavailing is petitioners' theory that there is no compelling need to apply the Rule of Necessity given their supposition that the three-judge panel never lost control over the case. Pet. 35. This theory is refuted by the plain terms of 28 U.S.C. § 46(c) and by circuit court authority, and was rightly not advanced by Judge Dennis in his dissent below. *See, e.g.*, 28 U.S.C. § 46(c); *Cooey*, 338 F.3d at 616; *Comer II*, 607 F.3d at 1061.

B. A Quorum May Be Achieved By Assigning An Active Circuit Judge From Another Circuit.

The *en banc* court could also satisfy the quorum requirement by requesting that the Chief Justice

temporarily assign an active circuit judge from another circuit. Congress has provided that "[t]he Chief Justice of the United States may, in the public interest, designate and assign temporarily any circuit judge to act as a circuit judge in another circuit upon request by the chief judge or circuit justice of such circuit." 28 U.S.C. § 291(a). By its plain terms, this section authorizes the Chief Justice to assign an active circuit judge of another circuit to act as a circuit judge in the proceedings below. A judge assigned pursuant to § 291(a) "shall have *all* the powers of a judge of the court, circuit or district to which he is designated and assigned." 28 U.S.C. § 296 (emphasis added).

Citing the Fifth Circuit's decision in *United States v. Nixon*, 827 F.2d 1019 (5th Cir. 1987), the *en banc* court declined to request a temporary circuit judge on the belief that § 291 is inapplicable to *en banc* proceedings. *Comer II*, 607 F.3d at 1054. *Nixon* held only that an out-of-circuit judge may not decide whether to *grant* a rehearing *en banc*. It did not address whether such a judge may decide a matter once the decision to grant rehearing has been made. *Nixon*, 827 F.2d at 1021-22.

That distinction matters because, although § 46(c) limits the eligibility to vote on *whether* to rehear a case *en banc* to the "circuit judges *of the circuit* who are in regular active service" (28 U.S.C. § 46(c) (emphasis added)), there is no similar restriction as to which judges may later decide the merits of the case *en banc*. In describing the judges who may decide an *en banc* case, § 46(c) omits the phrase "of the circuit" and simply provides that (with exceptions not relevant here) the *en banc* court "shall consist of all circuit judges in regular active service." 28 U.S.C. § 46(c). This omission is significant, given

that a prior version of § 46(c) provided that "'[a] court *en banc* shall consist of all active judges *of the circuit*.'" *Am.-Foreign Steamship*, 363 U.S. at 685-86 (quoting earlier version of § 46(c)) (emphasis added). This "change in language [must] be read, if possible, to have some effect." *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 263 (1992). The logical effect of the omission is to permit a temporarily-assigned judge to decide a case once the decision to grant rehearing has been made.[8]

Petitioners' argument that appointing a *temporary* judge from another circuit would "apparently violate separation of powers" raises no genuine doubts about the constitutionality of § 291(a). Pet. 33. No suggestion has been made that § 291(a) should be invoked to permanently assign a judge to the Fifth Circuit. *See Miller v. French*, 530 U.S. 327, 336 (2000) (acts of Congress are to be construed to avoid doubts as to their constitutionality, wherever "'fairly possible'" to do so) (quoting *Communications Workers v. Beck*, 487 U.S. 735, 762 (1988)). Petitioners' argument that it

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[8] The distinction drawn by § 46(c) between judges who decide whether to grant a rehearing *en banc* and judges who later decide the merits on rehearing is logical. The decision whether to rehear a case "is essentially a policy decision of judicial administration." *Moody v. Albermarle Paper Co.*, 417 U.S. 622, 627 (1974). Thus, it is reasonable to confine the decision to judges within the circuit. But once a rehearing has been granted, disposition of the case is not a matter of policy, but instead is simply a matter of the correct resolution of questions of law. *See id.* ("[V]oting on the merits of an in banc case is quite different from voting whether to rehear a case in banc . . . .").

would be inappropriate for a judge from another circuit to "decide what the law will be in the Fifth Circuit" (Pet. 33) is equally unpersuasive. The result that petitioners warn against is precisely the result contemplated by § 291(a). *See* 28 U.S.C. § 291(a) ("The Chief Justice of the United States may . . . designate and assign temporarily any circuit judge to act as a circuit judge in another circuit . . . .").

C. A Quorum May Be Achieved By Staying The Case Until A Quorum Is Restored.

A third option for resolving the loss of a quorum comes from this Court's decision in *North American Co. v. SEC*, 320 U.S. 708 (1943), where, after four Justices determined that they were disqualified from participating in the decision, the Court transferred the case to a special docket and stayed further proceedings until it had a quorum. *Id.* at 708-09. Petitioners agree that this is a legitimate option. Pet. 31-33.

The *en banc* court declined this approach out of concern about delaying disposition of the case. *Comer II*, 607 F.3d at 1054-55. Yet *North American* was stayed for approximately two years before being taken up again by this Court. *See N. Am. Co. v. SEC*, 327 U.S. 686 (1946). Even extended delay is insufficient grounds for declining to exercise this option.[9]

---

[9] Nor is it likely that any delay in this case would be nearly as long as was the case in *North American* because, as petitioners point out (Pet. 32), the President has nominated a judge to fill the vacancy in the Fifth Circuit that existed when the *en banc* court dismissed petitioners' appeal.

III. The Mandamus Petition Should Not Be Converted To A Certiorari Petition.

Petitioners note in a footnote that the Court has authority to convert a mandamus petition to a certiorari petition. Pet. 25 n.49. There are no grounds to do so in this case.

First, petitioners explicitly disclaim any interest in certiorari review by insisting that a writ of mandamus "is the proper remedy in this case." Pet. 25 n.49. Second, petitioners made a knowing, strategic decision not to seek certiorari relief, even though they acknowledged the availability of such relief in the court below. Pet. C.A. Letter Br. 9. They should be bound by that decision. Third, the result the *en banc* court reached—dismissal of the petitioners' appeal for lack of a quorum—is fully consistent with *Chrysler I* and does not conflict with decisions of other circuits. The established bases for certiorari are not present.

CONCLUSION

The petition for writ of mandamus should be denied.

November 29, 2010 Respectfully submitted,

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APPENDIX

APPENDIX

STATUTORY AND REGULATORY PROVISIONS INVOLVED

28 U.S.C. § 291:

Circuit judges

(a) The Chief Justice of the United States may, in the public interest, designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon request by the chief judge or circuit justice of such circuit.

(b) The chief judge of a circuit or the circuit justice may, in the public interest, designate and assign temporarily any circuit judge within the circuit, including a judge designated and assigned to temporary duty therein, to hold a district court in any district within the circuit.

28 U.S.C. § 296:

Powers upon designation and assignment

A justice or judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned.

Such justice or judge shall have all the powers of a judge of the court, circuit or district to which he is designated and assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices. However, a district judge who has retired from regular active service under section 371 (b) of this title, when designated and assigned to the court to which such judge was appointed, having performed in the preceding calendar year an amount of work equal to or months, and having elected to exercise such powers, shall have the powers of a judge of that court to participate in appointment of court officers and magistrate judges, rulemaking, governance, and administrative matters.

A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters.

28 U.S.C. § 2101:

Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under section 1253 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final

order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of

certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(g) The time for application for a writ of certiorari to review a decision of the United States Court of Appeals for the Armed Forces shall be as prescribed by rules of the Supreme Court.

177 5

No. 10-294

Supreme Court, U.S.
FILED
NOV 29 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

IN RE: NED COMER; *et al.*,

Petitioners.

On Petition for a Writ of Mandamus to the United States Court of Appeals for the Fifth Circuit

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RULE 29.6 STATEMENT

Respondent The AES Corporation has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondent Allegheny Energy, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondent The American Petroleum Institute has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondent BP America Production Co. is wholly and indirectly owned by BP p.l.c., a publicly held British company. Respondent BP Products North America, Inc. is wholly and indirectly owned by BP p.l.c., a publicly held British company.

Respondent Chevron U.S.A. Inc. is wholly and indirectly owned by Chevron Corporation, a publicly held corporation.

Respondent Cinergy Corporation merged into Respondent Duke Energy Corporation, a publicly held corporation. There is no publicly traded company owning 10% or more of the stock of Duke Energy Corporation.

Respondent ConocoPhillips Company is a wholly owned subsidiary of ConocoPhillips, a publicly held corporation.

Respondent The Dow Chemical Company has no parent corporation and no publicly held corporation owns more than 10% of its stock.

Respondent E. I. du Pont de Nemours & Company has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondent Entergy Corporation has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondent Exxon Mobil Corporation has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondent Honeywell International Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock. Respondent Universal Oil Products is wholly and indirectly owned by Respondent Honeywell International Inc., a publicly held corporation.

Respondent Murphy Oil USA, Inc. is a wholly owned subsidiary of Murphy Oil Corporation, which is a publicly held corporation.

Respondent Reliant Energy Inc., now known as RRI Energy, Inc., has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondent Shell Oil Company is wholly and indirectly owned by Royal Dutch Shell plc, a publicly held Dutch company.

Respondent Xcel Energy Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

Having opposed every option by which the en banc Fifth Circuit could have proceeded to decide this appeal, Petitioners now claim that a writ of mandamus should issue to save them from the resulting dismissal for lack of a quorum. According to Petitioners, they have a "clear and indisputable" constitutional right to one outcome—a return to the three-judge panel that had previously ruled in their favor. But there is no such right, let alone a "clear and indisputable" one, and the Fifth Circuit's dismissal was the inevitable and proper result of Petitioners' steadfast resistance to every alternative *Respondents* suggested for allowing this appeal to be heard en banc. The exceptional remedy of mandamus is not warranted to undo the consequences of Petitioners' own tactical decisions. Indeed, the Petition does not satisfy any of the three essential prerequisites for extraordinary mandamus relief from this Court.

First, by resisting or bypassing every available option for obtaining a merits decision other than a return to the three-judge panel—including a merits certiorari petition in this Court—Petitioners have failed to pursue "'other adequate means to attain the relief" requested. *Cheney v. U.S. District Court*, 542 U.S. 367, 380 (2004).

Second, Petitioners have failed to show that their "right to issuance of the writ is clear and indisputable." *Id.* at 381 (internal quotation marks omitted). Petitioners' fundamental premise—that they have a "clear and indisputable" constitutional right to have the case returned to the three-judge panel—is plainly wrong. There is no constitutional right to an appeal in a civil case, and once Petitioners succeeded in persuading the en banc Fifth Circuit (over Respondents' objection) that the court lacked a quorum to act, the

court had no authority to do anything except dismiss the appeal. There was nothing improper or extraordinary about the Fifth Circuit's disposition, which mirrors what occurred when this Court lacked a quorum to decide an appeal as-of-right, *see Chrysler Corp. v. United States*, 314 U.S. 583, 583 (1941), and what occurs when an en banc court is evenly divided, *see Thompson v. Connick*, 578 F.3d 293, 293 (5th Cir. 2009) (en banc) (summarily affirming district court rather than returning the case to the three-judge panel). Moreover, given that the Fifth Circuit produced three separate opinions taking divergent views as to the proper disposition of this case, *see* Pet. App. 2-32, the only thing that is clear and indisputable is that the right answer below was *not* clear and indisputable.

Third, the totality of the circumstances makes this case an unsuitable candidate for an exercise of this Court's discretion to grant mandamus. *Cheney*, 542 U.S. at 381. Although Petitioners wrongly complain of an "egregious breakdown of regular procedure," Pet. 14, they fail to recognize that they shaped that procedure by actively opposing every option Respondents suggested for allowing the appeal to proceed before the en banc court. Moreover, even though the Fifth Circuit—and Petitioners themselves—emphasized below that merits review remained available in this Court, Petitioners elected not to file a certiorari petition on the merits. By instead filing a mandamus petition that carefully avoids almost *any* mention of the merits, Petitioners have again bypassed an obvious and available option for achieving their professed goal of obtaining a merits disposition of their appeal. These circumstances do not warrant an extraordinary writ of mandamus.

STATEMENT

1. Petitioners are Mississippi homeowners whose residences were allegedly damaged by Hurricane Katrina. They alleged that the Respondent oil, coal, utility, and chemical companies "unreasonably" engaged in worldwide energy exploration and production activities that "produce massive amounts of greenhouse gases," thereby contributing (together with all other sources of greenhouse gases) to "[i]ncreasing the concentration of greenhouse gases in the atmosphere." (Ct. of App. Record on Appeal (ROA) 753, 761.) This increase in the worldwide atmospheric concentration of such gases allegedly contributed to "a marked increase in global temperature which, in turn, produced the conditions whereby a storm of the strength and size of Hurricane Katrina would inevitably form and strike the Mississippi Gulf Coast resulting in extensive death, injury and destruction." (ROA 764-65.) Based on these allegations, Petitioners asserted putative class-action claims for nuisance, trespass, negligence, fraud, unjust enrichment, and civil conspiracy "under the laws of the State of Mississippi and appropriate legal regimes imported by the applicable choice of law rules." (ROA 756-57; *see also* ROA 767-68.)

2. After extensive briefing, the district court dismissed the action. The court concluded that Petitioners lacked Article III standing because their injuries were not "attributable or traceable to these individual defendants," but "to a larger group" that is "not before this Court, not only within this nation but outside of our jurisdictional boundaries as well." (Ct. of App. Record Excerpts (RE), Tab 5, at 36.) The district court also held that Petitioners' claims were

barred by the political question doctrine, because adjudication of those claims would require the court to do what *Baker v. Carr*, 369 U.S. 186 (1962), "told me not to do, and that is to balance economic, environmental, foreign policy, and national security interest[s] and make an initial policy determination of a kind which is clearly non-judicial." (RE, Tab 5, at 40.)

3. A three-judge panel of the Fifth Circuit issued an opinion reversing in part.[1] *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009). The panel held that Petitioners had satisfied Article III's requirement that their injuries be fairly traceable to Respondents' conduct by alleging that Respondents "*contribute* to, rather than solely or materially cause," global warming. *Id.* at 866. As to the political question doctrine, the panel acknowledged that *Baker v. Carr* articulated six alternative "formulations" for determining justiciability, but it dismissed these tests as "not necessary or properly useful in this case." *Id.* at 875. Instead, the panel held that the standard is "whether a question is entrusted by the Constitution or federal laws exclusively to a federal political branch for its decision." *Id.* at 872. The panel also briefly concluded that the *Baker* tests were not met. *Id.* at 875-76. Accordingly, the panel reversed the

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[1] The case was argued to two different panels in the court of appeals. The appeal was first assigned to a panel consisting of two active circuit judges and a district judge sitting by designation, but the district judge became unavailable shortly before the scheduled argument. After the case was argued and submitted to the remaining two judges, one of those judges recused himself, depriving the panel of a quorum. The case was then reargued to a new panel consisting of three active circuit judges.

dismissal of Petitioners' nuisance, negligence, and trespass claims. *Id.* at 879.[2]

Judge Davis "agree[d] with the panel opinion" on the standing issue, but agreed only "with the result" on the political question doctrine. *Id.* at 880. Judge Davis stated that, "[i]f it were up to me, I would affirm" on the ground that Petitioners had failed to allege proximate cause. *Id.*

4. Respondents petitioned for rehearing en banc, which was granted on February 26, 2010. Pet. App. 47. Seven of the court's 16 active judges were "recused and did not participate." *Id.*, n.1. Because the order did not retain the panel opinion pending rehearing, the effect of the order was to vacate that opinion and to stay the mandate. *See* Fifth Cir. R. 41.3. The en banc court ordered additional merits briefing, which was completed on April 30, 2010.

On the same date that briefing was completed, the clerk of the court notified the parties that an additional judge had recused herself and that the court believed it no longer had a quorum. Shortly thereafter, the court requested supplemental letter briefs addressing how it should proceed. Pet. App. 44-45.

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[2] The panel affirmed the dismissal of Petitioners' claims for unjust enrichment, fraud, and civil conspiracy. *Comer*, 585 F.3d at 867-69. The panel held that this subset of claims rested on an "alleged failure of the government to properly regulate and enforce environmental laws," and thereby ran afoul of prudential standing principles prohibiting reliance upon a "generalized grievance that is more properly dealt with by the representative branches." *Id.* at 868-69. Petitioners subsequently abandoned these claims by failing to defend them in their en banc merits brief.

Respondents argued that the court still had a quorum under the applicable statute, but that even if it did not, there were a number of available alternatives for curing the lack of a quorum. Defendants-Appellees' Supp. Letter Br. at 1-11 (5th Cir. May 12, 2010). Respondents explained, however, that if the court were to reject all of these alternatives, the only remaining option would be to dismiss the appeal, leaving the district court judgment intact. Petitioners, by contrast, argued for only one outcome—a return to the three-judge panel that had already ruled in their favor. Plaintiffs-Appellants' Supp. Reply Letter Brief at 1, 5-6 (5th Cir. May 17, 2010).

On May 28, 2010, the en banc court issued a per curiam order concluding that it had lost its quorum and therefore lacked authority to transact judicial business. Pet. App. 2-3. After briefly rejecting all other possibilities for disposing of the appeal, the court concluded that its only option was to dismiss the appeal. Pet. App. 3-5.

Judge Davis, joined by Judge Stewart, dissented, arguing that dismissal was not appropriate and that, alternatively, the appointment of a judge from another circuit to achieve a quorum was a preferable, and appropriate, remedy. Pet. App. 6-9.

Judge Dennis also dissented. Pet. App. 9-32. He argued that the court had a quorum and that even if it did not, the court could achieve a quorum by invoking the Rule of Necessity, requesting designation of a judge from another circuit, or holding the case over until the court regained a quorum. *Id.*

REASONS FOR DENYING THE PETITION

Mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Ex Parte Fahey*, 332 U.S. 258, 259-60 (1947); *see also Kerr v. U.S. District Court*, 426 U.S. 394, 402 (1976) (same). An original writ of mandamus issuing directly from this Court is an even more extraordinary remedy, and the discretion to issue such a writ is "sparingly exercised." Sup. Ct. R. 20.1.[3] Traditionally, the "'use of the writ in aid of appellate jurisdiction'" has been to confine a lower court "'to a lawful exercise of its prescribed jurisdiction.'" *Cheney v. U.S. District Court*, 542 U.S. 367, 380-81 (2004). Accordingly, "only exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of this extraordinary remedy." *Id.* at 380 (citations and internal quotation marks omitted).

Because the writ "is one of 'the most potent weapons in the judicial arsenal,' three conditions must be satisfied before it may issue." *Cheney*, 542 U.S. at 380-81. *First*, "'the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires'—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process." *Id.* at 380-81. *Second*, "the peti-

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[3] Respondents have not located any case in more than 30 years in which this Court has granted an original writ of mandamus. *Cf. Connor v. Coleman*, 440 U.S. 612, 614 (1978) (granting leave to file mandamus petition and ordering three-judge district court "forthwith" to adopt a reapportionment plan); *Connor v. Coleman*, 441 U.S. 792 (1979) (denying mandamus after district court complied with prior order).

tioner must satisfy the burden of showing that [his or her] right to issuance of the writ is clear and indisputable." *Id.* at 381 (internal quotation marks omitted). *Third*, "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.*

Petitioners have failed to satisfy any of these requirements.[4]

I. Petitioners Have Failed to Pursue Available Alternatives

A. Mandamus Is Unavailable When a Petitioner Has Forfeited Available Alternatives

This Court has long held that a "petition for writ of mandamus will not be granted" when a petitioner had available alternative means of obtaining relief but failed to invoke those alternatives in a timely manner. *See Ex Parte Nat'l Park Bank*, 256 U.S. 131, 133 (1921) (failure to properly raise point on rehearing below, or in a petition for certiorari, barred mandamus); *Ex Parte Riddle*, 255 U.S. 450, 451 (1921) (failure to properly raise point below, or in a writ of

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[4] The petition would fare no better if it were converted into a certiorari petition addressed to the quorum issues, Pet. 25 n.49, because those issues are plainly unworthy of this Court's review. As set forth below, the Fifth Circuit's dismissal for lack of a quorum is consistent with this Court's precedent and does not conflict with any decision of any other circuit. Moreover, as Petitioners acknowledge (Pet. 26-27), the circumstances that produced dismissal here (a quorum at the time rehearing en banc was granted, followed by a later loss of a quorum) are unique and unlikely to recur.

error, barred mandamus). This rule follows from the settled principle that mandamus is a last-resort remedy. If the requirement that there be no adequate alternative to mandamus could be satisfied simply by *forfeiting* a means of obtaining relief through ordinary methods of review, then mandamus could readily be "used as a substitute for the regular appeals process." *Cheney*, 542 U.S. at 380-81.

Accordingly, to satisfy the threshold requirement that "the party seeking issuance of the writ ha[s] no other adequate means to attain the relief he desires," *Kerr*, 426 U.S. at 403, it is not enough to show that a petitioner *no longer* has an alternative remedy. If the petitioner had an adequate means of obtaining relief, but waived or forfeited that remedy, then mandamus relief is unavailable.

B. Petitioners Forfeited at Least Two Alternatives

In light of these principles, the Court should deny Petitioners' request for a writ of mandamus. Petitioners failed to avail themselves of at least two alternative avenues for obtaining a merits disposition of their appeal.

1. Petitioners Opposed Every Alternative Respondents Suggested for Hearing the Appeal En Banc

First, Petitioners affirmatively opposed below every suggested option for avoiding dismissal (other than reinstatement of the panel opinion), including one alternative that they now contend would have been viable and that they ask this Court to order the Fifth Circuit to revisit.

In their supplemental opening brief, Respondents presented a menu of options for the en banc court to consider in resolving the quorum issue, including the following:

> (1) finding that the en banc court did have a quorum under the proper construction of 28 U.S.C. § 46(d);
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> (2) amending the Local Rules to invoke a statutory exception allowing smaller en banc panels, *see* 28 U.S.C. § 46(c), and deferring further consideration of the case under *North American Co. v. S.E.C.*, 320 U.S. 708 (1943), "until the amended rule took effect";
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> (3) divesting disqualifying stock interests, as permitted under Advis. Opn. No. 69, Comm. on Codes of Conduct (June 2009 ed.)[5];
>
> (4) consulting with the Advisory Committee on Codes of Conduct to determine whether the existing recusals were warranted, as was done in *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 719 F.2d 733, 735 (5th Cir. 1983) (noting that four judges withdrew their disqualifications after such consultation);
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> (5) requesting designation of an out-of-circuit active judge to serve on the en banc Fifth Circuit, pursuant to 28 U.S.C. § 291(a); and
>
> (6) invoking the Rule of Necessity.

Defendants-Appellees' Supp. Letter Brief at 1-11 (5th Cir. May 12, 2010). Respondents noted, however,

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[5] Available at <http://www.uscourts.gov/guide/Vol02B-Ch02-OGC-Post-PublAdvisoryOpps.pdf> at page 69-1.

that if all of these options were rejected, the only remaining alternative would be to dismiss the appeal for lack of a quorum, as this Court did when it lacked a quorum in *Chrysler Corp. v. United States*, 314 U.S. 583 (1941).

By contrast, Petitioners' supplemental opening brief proposed only one option—that the court "reinstate the panel's decision." Plaintiffs-Appellants' Supp. Letter Brief at 9 (5th Cir. May 12, 2010) ("Petrs.' Supp. Open. Br."). In their reply brief, Petitioners expressly opposed all of Respondents' suggestions for resolving the quorum issue, and they again insisted that the only option was to vacate the grant of rehearing en banc and restore the case to the panel. Plaintiffs-Appellants' Supp. Reply Letter Brief at 1, 6 (5th Cir. May 17, 2010) ("Petrs.' Supp. Reply Br."). Petitioners' all-or-nothing strategy backfired, however, when the en banc court concluded that it lacked statutory authority to "dis-en banc" the case and that the only available disposition was the same one suggested by *Chrysler*—dismissal. Pet. App. 4-6.

In their Petition in this Court, Petitioners reverse course. They contend that the "Fifth Circuit had several options for resolving its quorum issue" and that "*any* of the other options" besides dismissal would have been preferable. Pet. 27 (emphasis added). Although still questioning the propriety of several of these options, *see* Pet. 33-36, Petitioners now fault the en banc court for declining to invoke its discretion to defer further proceedings until such time as it might have a quorum. *See* Pet. 31-33.

Petitioners fail to note, however, that they affirmatively *opposed* a deferral of the case in the Fifth Circuit. Petrs.' Supp. Open. Br. at 10. The Fifth Circuit

did not deny that it *had* discretion to defer the case, Pet. App. 5, and if Petitioners had affirmatively requested a deferral, the court might have exercised its discretion differently. *Cf. North American Co. v. S.E.C.*, 327 U.S. 686 (1946) (when, two years after order deferring the case, Justice Burton replaced Justice Roberts, case was then decided by a quorum of 6 Justices).[6] By opposing an option whose viability they now urge, Petitioners demonstrably failed to pursue all available alternatives for obtaining relief.

Deferral was not the only discretionary option that Petitioners affirmatively opposed below. Petitioners likewise opposed as "inappropriate" Respondents' suggestion that judges could sell their disqualifying stock, *see* Petrs.' Supp. Reply Br. at 5, even though the practice is specifically endorsed by the Advisory Committee on Canons of Judicial Conduct, *see supra* at 10, is partly codified in 28 U.S.C. § 455(f), and is specifically accommodated by the Internal Revenue Code, *see* 26 U.S.C. § 1043(b). The court below may have been discouraged from considering this option by Petitioners' assertion that, by doing so, the court would "open itself to questions about the propriety" of its actions. Petrs.' Supp. Reply Br. at 5.

A petition for a writ of mandamus is reserved as a last-resort remedy when all other alternatives for obtaining relief have been tried and failed—not when, as here, such alternatives have been bypassed.

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[6] As *North American* shows, Petitioners are wrong in suggesting that deferral became an option only when a nominee was named. Pet. 32-33.

2. Petitioners Failed to File a Certiorari Petition Raising the Merits

Mandamus is unavailable for the further reason that Petitioners failed to pursue a certiorari petition directed to the *merits* of their appeal. In the absence of circumstances of "such public importance and exceptional character" as to warrant bypassing alternative means of relief, *Ex Parte Peru*, 318 U.S. 578, 586 (1943), a party's failure to seek available merits review "in this court by a petition for a writ of certiorari" bars issuance of a writ of mandamus. *Ex Parte Nat'l Park Bank*, 256 U.S. at 133.

Petitioners unquestionably had the option of filing such a petition. This Court has certiorari jurisdiction over any case that was "in the court of appeals," 28 U.S.C. § 1254(1), and this case was "in" the Fifth Circuit by virtue of Petitioners' timely notice of appeal and the jurisdiction conferred by 28 U.S.C. § 1291. *Nixon v. Fitzgerald*, 457 U.S. 731, 742-43 (1982). Indeed, Petitioners expressly acknowledged the availability of certiorari review on the merits when they successfully used that possibility as a sword against application of the Rule of Necessity in the Fifth Circuit. *See* Petrs.' Supp. Letter Br. at 4; Pet. App. 4.

Although Petitioners' mandamus petition contains a footnote observing that this Court "has the authority to convert a Petition for a Writ of Mandamus to a Petition for Certiorari," *see* Pet. 25 n.49, such a conversion—which Petitioners never actually request—would not obviate the problem here. Even if the current petition were recast as one seeking a writ of certiorari, the *merits* of the political question and Article

III standing issues at the heart of the appeal are not "fairly included therein." S. Ct. R. 14.1(a). Apart from three sentences observing that the district court dismissed the case on these grounds, *see* Pet. 6-7, 25-26, the Petition never mentions these issues, nor does it purport to discuss their proper resolution in light of the applicable case law. Indeed, the Petition fails even to include in the appendix either the district court's decision or the vacated panel opinion, thereby further confirming that the Petition does not fairly include those issues.[7]

Petitioners suggest that a merits certiorari petition would have been futile because this Court generally does not "sit as a first-instance court of appeals." Pet. 23. But the perceived futility of an alternative is *not* a basis for seeking mandamus instead. *In re Blodgett*, 502 U.S. 236, 240 (1992) (even though a further motion in the court of appeals "had little chance of success," such a motion was "a predicate for extraordinary relief" and should have been sought); *cf. Engle v. Isaac*, 456 U.S. 107, 130 (1982) (asserted futility does not excuse failure to seek state-court re-

[7] Moreover, the petition cannot now be amended to request that the Court grant certiorari on the merits, because the jurisdictional time limit to file such an entirely different petition has expired. 28 U.S.C. § 2101(c); *see* Eugene Gressman, et al., *Supreme Court Practice* § 6.27 at 471 (9th ed. 2007) ("it is not clear whether the Court has jurisdiction to permit" such an amendment); *cf. Costello v. United States*, 365 U.S. 265, 284 (1961) (granting leave where amended petition in civil case was submitted *within* the 90-day period); *Northeast Bancorp v. Board of Governors*, 472 U.S. 159, 176-78 (1985) (where petition already put constitutionality of statutes at issue, Court addressed related ground raised outside the 90-day window).

lief before seeking a writ of habeas corpus). Moreover, it is not clear that a merits certiorari petition would have been futile. *See, e.g., Connecticut v. American Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009), *petition for cert. filed*, No. 10-174. Petitioners' decision to forego filing such a petition further confirms their failure to pursue available alternatives to mandamus.[8]

II. Petitioners Have Failed to Show a Clear and Indisputable Right to a Writ of Mandamus

Petitioners' request for a writ of mandamus fails for the further reason that Petitioners have not shown a "clear and indisputable right" to the relief they seek. *Cheney*, 542 U.S. at 381. Here, the specific relief Petitioners request is a writ directing the Fifth Circuit to reinstate their appeal and "return it to the panel for final adjudication." Pet. 6. Petitioners have failed to show either a clear and indisputable error in the Fifth Circuit's dismissal of their appeal or a clear and indisputable entitlement to an order returning the case to the panel.

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[8] Petitioners argue that mandamus is the "only" proper remedy here because review of recusal issues is sometimes accomplished through mandamus petitions. Pet. 24-25 (citing cases). In contrast to the cited cases, however, Petitioners do not seek interlocutory review of the correctness of any particular judge's decision regarding recusal.

A. Petitioners Have Not Shown That the Fifth Circuit Made a Clear and Indisputable Error in Dismissing for Lack of a Quorum

1. The Fifth Circuit's Dismissal Was Proper Under This Court's Decision in *Chrysler v. United States*

The very disposition Petitioners contend was a clear and indisputable error—dismissal of the appeal for lack of a quorum—is the same one that this Court adopted when confronted with a lack of a quorum in *Chrysler Corp. v. United States*, 314 U.S. 583 (1941). In *Chrysler*, this Court had direct and exclusive appellate jurisdiction under a special statute governing antitrust cases, 15 U.S.C. § 29 (1940 ed.), but due to the recusal of four Justices, the Court lacked a quorum to decide Chrysler's appeal. 314 U.S. at 583. At that time, Congress had not yet enacted any statute specifying how the Court should dispose of a specific case in which it lacked a quorum.[9] This Court

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[9] In 1944, three years after *Chrysler*, Congress amended 15 U.S.C. § 29 to authorize this Court, in any direct appeal under that section in which it lacked a quorum, to order that the appeal instead be decided by a special three-judge panel of the relevant circuit court of appeals. Pub. L. No. 78-332, ch. 239, 58 Stat. 272 (1944). Thereafter, as part of its general revision and codification of the judicial code in 1948, Congress enacted a more general provision, 28 U.S.C. § 2109, which grants this Court similar authority with respect to all direct appeals in which it lacks a quorum. Pub. L. No. 80-773, ch. 646, 62 Stat. 869, 963, § 1 (1948). Section 2109 also specifies that, in any case not arising on direct appeal in which the Court lacks a quorum (*e.g.*, cases arising on certiorari), the Court must issue an order affirming the judgment below "with the same effect as upon affirmance by an equally divided court." 21 U.S.C. § 2109; *see*,

thus found itself in precisely the quandary that confronted the en banc Fifth Circuit here—it had direct appellate jurisdiction, but concluded that it lacked a quorum. And this Court did precisely what the Fifth Circuit did—it dismissed the appeal. 314 U.S. at 583. In light of *Chrysler*, it cannot be said that the Fifth Circuit's dismissal involves a "clear and indisputable" error.

2. Petitioners' Contrary Arguments Are Meritless

Although *Chrysler* is dispositive and figured prominently in the briefing below, the Petition does not even mention it. Petitioners instead advance an assortment of meritless arguments. Pet. 14-21, 26-31.

a. Petitioners' Argument That Only a Court With a Quorum Can Dismiss an Appeal Is Contrary to *Chrysler*

Petitioners contend that if a court lacks a quorum to *decide* an appeal, it necessarily lacks authority to *dismiss* the appeal. Pet. 17-19. This contention cannot be squared with *Chrysler*, in which this Court did precisely what Petitioners claim is forbidden. Under *Chrysler*, the one thing an appellate court incurably lacking a quorum *can* do—indeed, absent some other statutory authorization, the *only* thing it can do—is to dismiss the appeal.

Petitioners nevertheless contend that the en banc Fifth Circuit exceeded its authority in this case, be-

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e.g., *American Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008).

cause it issued an opinion *explaining* why it lacked a quorum. Pet. 18-19. But a court always has power to decide whether it has authority to adjudicate a particular case; only when the court concludes that it does have such authority may it proceed to render a decision on the merits. A court *always* has jurisdiction to decide its jurisdiction, *United States v. Shipp*, 203 U.S. 563, 573 (1906), and it likewise always has the power (indeed, the obligation) to determine whether it has a quorum, *Chrysler*, 314 U.S. at 583; *United States v. Desimone*, 140 F.3d 457, 458 (2d Cir. 1998).

b. Once Rehearing En Banc Is Granted, a Three-Judge Panel Lacks Statutory Authorization to Proceed

Petitioners contend that dismissal was improper because the en banc Fifth Circuit was not the exclusive forum for deciding the appeal. According to Petitioners, the en banc court had the option of returning the case to the panel. Pet. 21, 28-31. This argument contradicts the language of the controlling statute.

Under 28 U.S.C. § 46(c), "[c]ases and controversies shall be heard and determined by a court or panel of not more than three judges ... *unless* a hearing or rehearing before the court in banc is ordered" (emphasis added). Thus, by the plain terms of the statute, once a "rehearing before the court in banc is ordered," a three-judge panel is no longer authorized to "hear[]" and "determine[]" the appeal. At that point, exclusive authority rests in the en banc court. *See Cooey v. Bradshaw*, 338 F.3d 615, 616 (6th Cir. 2003) (en banc) (Clay, J., concurring) ("The granting of initial

en banc review eliminated the panel's jurisdiction over this matter.").

Petitioners nonetheless argue that the en banc court, even if it lacked a quorum, had authority to "vacate the order granting en banc rehearing" and to transfer the case back to a three-judge panel. Pet. 28-29. The Fifth Circuit correctly rejected this argument that a quorum-less court can "dis-enbanc" a case. Pet. App. 4. As Petitioners concede, the quorum requirement in § 46(d) applies, by its terms, to all actions of "a court or panel thereof." 28 U.S.C. § 46(d). Moreover, the vesting of authority in panels versus the full court is *not* a subject on which the statute is silent. Section 46(c) specifically describes both the composition of the en banc court that may vote to rehear a case and the composition of the en banc court that thereafter has control over the case. *Id.*, § 46(c). Under § 46(d), a quorum is clearly required for any such actions by the en banc court. No provision in the statute authorizes a quorum-less en banc court to take another vote on en banc rehearing and to send the case to a three-judge panel. On the contrary, the statute explicitly states—without exception—that once an en banc rehearing is "*ordered*" by an en banc court acting with a quorum, a three-judge panel may no longer proceed. *Id.*, § 46(c) (emphasis added).

Accordingly, the en banc Fifth Circuit found itself in the same situation this Court confronted in *Chrysler*: under the applicable statute, it was the only court authorized to hear the case, but it concluded that it lacked a quorum. Given Petitioners' opposition to all other alternatives for curing the lack of a

quorum, the proper disposition was the same one as in *Chrysler*—dismissal.

The correctness of the Fifth Circuit's dismissal is confirmed by the practice that is followed if, after granting rehearing, an en banc court is equally divided. In such a case, the en banc court does not reinstate the panel opinion or return the case to the panel; instead, it enters a summary order affirming the district court judgment. *See, e.g.*, *Thompson v. Connick*, 578 F.3d 293, 293 (5th Cir. 2009) (en banc); *Peoples v. CCA Detention Ctrs.*, 449 F.3d 1097, 1999 (10th Cir. 2006) (en banc). The net effect is exactly the same, whether it is called an "affirmance" or a "dismissal"—the district court judgment is left intact. *Cf.* 28 U.S.C. § 2109 (drawing a direct analogy between a summary affirmance for lack of a quorum and an affirmance by an equally divided court).

c. Petitioners' Complaints About the Fifth Circuit's Rules Are Wrong and Irrelevant

Because the applicable *statute* precluded returning the case to the panel, Petitioners' extended discussion of the Fifth Circuit's Rules and "Internal Operating Procedures" is beside the point. Pet. 20-21, 28-31. In any event, Petitioners misconstrue these materials.

Petitioners wrongly assert that, under the Fifth Circuit's Internal Operating Procedures, the panel retained authority over the appeal during the en banc proceedings. Such a retention of authority would directly contradict § 46(c), and it is therefore not surprising that the court's internal procedures say nothing of the sort. Rather, they state only that "*the filing* of a petition for rehearing en banc does not take

the case out of the control of the panel deciding the case," so that, for example, the panel itself "may grant rehearing without action by the full court." Rules and Internal Operating Procedures of the Fifth Circuit at 35-4 (2009) (emphasis added). Nothing in the procedures suggests that, in a case where the en banc court *has* acted by ordering rehearing en banc, the panel retains authority to act.

For similar reasons, Petitioners are wrong in suggesting that it was Fifth Circuit Rule 41.3 that led to the dismissal for lack of a quorum, and that the Rule should therefore be declared invalid. Pet. 29-31. The dismissal here did not arise from Rule 41.3, which merely states that, upon grant of rehearing, the panel opinion is vacated unless the en banc court orders otherwise. Rather, it arose from the quorum and en-banc provisions of a federal statute, *viz.*, 28 U.S.C. § 46.

Moreover, Petitioners misconstrue the limited significance that Rule 41.3 had here. As Petitioners implicitly concede, they would have no basis for objecting if the Fifth Circuit, at the time it granted rehearing en banc (with a quorum), had "*expressly* vacate[d] the panel decision in its Order." Pet. 30 (emphasis added). But Petitioners object that vacatur occurred here through the supposed "automatic[]" operation of Rule 41.3. But there was nothing "automatic" about that result. The local rule states that, unless the en banc court "otherwise expressly provide[s]" in its order, the panel's opinion and judgment are vacated upon the grant of rehearing. 5th Cir. R. 41.3. Thus, if the en banc court wants the panel opinion to remain in place, it can, and must, so specify. Here, the Fifth Circuit did not include any such

language in its order, opting not to retain the panel opinion. That decision, made when the court had a quorum, was unassailable.

d. Petitioners' Constitutional Claims Are Insubstantial

Petitioners assert that "[u]nder the U.S. Constitution, litigants have a right to an appeal," and that the Fifth Circuit therefore "had a constitutional duty to decide th[is] appeal." Pet. 15, 19. This argument fails, because there is no constitutional right to an appeal in a civil case. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996). Petitioners have only a statutory right to an appeal, one that is necessarily subject to all of the statutes and rules governing the disposition of appeals, including those (such as 28 U.S.C. § 46) that govern en banc proceedings. Consequently, the Fifth Circuit's invocation of that framework of statutes and rules cannot be said to have unconstitutionally deprived Petitioners of their statutory right to appeal.

Equally unavailing is Petitioners' reliance on inapposite cases holding that courts have only limited powers of abstention. *See, e.g., New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 358 (1989) (citing *Cohens v. Virginia*, 19 U.S. 264 (1821)). None of these cases supports the proposition that a court is barred from dismissing an appeal when it concludes that it lacks a quorum. On the contrary, a quorum has long been deemed essential to ensuring that a court is "legally able to transact business." *Nguyen v. United States*, 539 U.S. 69, 82 (2003).

Petitioners also contend that dismissal of their appeal deprived them of their constitutional right to equal protection. This contention is waived, because Petitioners never argued below that a dismissal would violate equal protection. It is also frivolous. Petitioners' appeal was not "arbitrarily" dismissed, Pet. 16-17; it was dismissed after the en banc court held that it had lost its quorum. *See supra* at 16-20.

Petitioners are also wrong in contending that they were denied equal protection because most circuits do not "automatically vacate the panel decision when rehearing is granted." Pet. 16.[10] All circuits are bound to follow § 46, which was the ultimate cause of the dismissal here. And to the extent that the circuits follow different conventions as to whether an en banc order that is otherwise silent operates to vacate the panel opinion, that is merely a convention about how to write such orders. *See supra* at 21-22.

B. Petitioners Have Failed to Make a "Clear and Indisputable" Showing That They Are Entitled to an Order Returning the Case to the Panel

Although Petitioners contend that any of the alternatives proposed by Respondents below would have been preferable to dismissal, Pet. 27, they persist in arguing, as they did below, that these various alter-

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[10] Petitioners' description of the circuits' practices with respect to vacating panel opinions, *see* Pet. 16 n.29, is inaccurate because Petitioners overlook the fact that many circuits address the subject only in their internal operating procedures. *See, e.g.*, D.C. Cir. Handbook of Practice & Internal Procs., XIII(B)(2); 1st Cir. Internal Operating Procs., X(D); 3d Cir. Internal Operating Procs., 9.5.9; 7th Cir. Internal Operating Procs., 5(e).

natives should be rejected. Pet. 33-36. Consequently, this Court can and should *deny* the Petition without further considering alternatives that Petitioners themselves have consistently opposed.[11]

The converse, however, is not true. If the Court were to conclude that the Fifth Circuit's dismissal constituted a clear and indisputable error, Petitioners still would not be entitled to an order returning the case to the panel. To establish an entitlement to that relief, Petitioners must also show that they are correct in contending that the various alternatives proposed by Respondents were unavailable. *See* Pet. 33-36. They have failed to do so. Because, as set forth

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[11] Petitioners now alternatively suggest that the Fifth Circuit could have exercised its discretion to defer proceedings, but Petitioners forfeited this argument by opposing such a deferral below. *See supra* at 11-12. And because any such decision was committed to the discretion of the court of appeals, it cannot be said that Petitioners had a "clear and indisputable" right to deferral. *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). Moreover, as the Fifth Circuit noted, it is a matter of speculation whether or not a newly confirmed judge would also recuse or whether, during a deferral, other changes might occur in the composition of the court or the recusal status of its judges. Pet. App. 5. Subsequent events have confirmed the wisdom of that observation. Although Petitioners note that the Hon. James E. Graves, Jr. has been nominated to the court, *see* Pet. 32 n.61, Petitioners fail to note that the nominee's son is (and has been continuously since 2006 in both the district court and court of appeals) a counsel of record in this matter for one of the Respondents. And after the Petition was filed, one of the recused judges (Judge Wiener) assumed senior status, suggesting that the en banc court at this moment might conceivably have a quorum available even under Petitioners' view (8 of 15 active judges)—but only if no other recusals have occurred in the meantime and only until the court's status changes yet again.

below, there were at least three options for resolving the quorum issue—any one of which would preclude returning the case to the panel—Petitioners have failed to show a clear and indisputable right to the specific relief they request.

1. Petitioners Have Failed to Show That an Eight-Judge En Banc Court Would Be Improper

Petitioners contend, as they did below, that 28 U.S.C. § 46 requires a quorum of nine judges for the en banc Fifth Circuit to act. Pet. 34. Petitioners are incorrect.

Under § 46(d), a quorum is "[a] majority of the number of judges authorized to constitute a court or panel thereof, *as provided in paragraph (c).*" 28 U.S.C. § 46(d) (emphasis added). In defining both the set of judges who may vote to grant rehearing en banc and the set who may then decide the merits, paragraph (c) of § 46 uses the same key phrase: "circuit judges ... in regular active service." *Id.*[12] Prior to the 2005 amendments to Fed. R. App. P. 35(a), the circuits disagreed as to whether *recused* judges were included within that phrase for purposes of § 46(c)'s requirement that rehearing en banc be ordered by a "majority" of "circuit judges ... in regular active service." *See* Fed. R. App. P. 35(a) advisory committee's note (2005 amend.) ("2005 Advis. Comm. Note"). The 2005 amendment to Rule 35(a) resolved this dispute

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[12] Whereas § 46(c) states that only "circuit judges *of the circuit* who are in regular active service" may vote to rehear a case en banc, the separate clause of § 46(c) that defines the judges who may then decide the merits omits the italicized phrase and also provides for certain additional exceptions. *See infra* at 29.

by adopting *"a uniform national interpretation of § 46(c)"* under which the phrase "circuit judges ... in regular active service" would be construed to exclude recused judges. 2005 Advis. Comm. Note (emphasis added); *see also* Fed. R. App. P. 35(a) (explicitly providing that a "majority of the circuit judges *who are in regular active service and who are not disqualified* may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc") (emphasis added).

The Advisory Committee's reasoning for adopting this construction of § 46(c) is directly applicable here. The Committee agreed with the en banc Fourth Circuit's conclusion that the phrase "circuit judges in regular active service," as used in § 46(c) to describe the set of judges who may *decide* the merits of an en banc rehearing—which is the clause at issue here—"does not include disqualified judges, as disqualified judges clearly cannot participate in a case being heard or reheard en banc." 2005 Advis. Comm. Note; *Arnold v. Eastern Air Lines*, 712 F.2d 899 (4th Cir. 1983) (en banc). The Committee concluded that the identical language in the separate clause defining the judges who may vote to *grant* rehearing must be given the same reading, 2005 Advis. Comm. Note, and the Committee therefore proposed amending Rule 35(a) to reflect that construction of § 46(c). This Court approved the Committee's amendment to Rule 35 without recorded dissent. *Amendments to Fed. R. App. P.*, 544 U.S. 1151, 1160 (2005); *cf. also* 28 U.S.C. § 2072(b) (once promulgated by this Court, rules prevail over "[a]ll laws in conflict with such rules").

This construction of § 46(c) logically must carry over to the determination of a quorum under § 46(d)

(even though the Committee itself declined to resolve that issue expressly).[13] As noted above, § 46(d)'s definition of a quorum explicitly turns on § 46(c)'s definition of an en banc court. Because recused judges are not considered judges "in regular active service" in defining the court under § 46(c), they likewise cannot be counted in determining whether a quorum exists under § 46(d). *See Arnold*, 712 F.2d at 905 (§ 46 cannot be read to require that "a judge, though disqualified, should be treated as though he were part of the quorum"). Conversely, under the Fifth Circuit's (and Petitioners') view that the phrase "circuit judges in regular active service" must be read to *include* recused judges when calculating a quorum of the en banc court that may *decide* a case, *see* Pet. App. 3-4, that reading would have to carry over to the en banc *granting* context as well—meaning that, under Petitioners' view, the amendment to Rule 35 approved by this Court is necessarily invalid.

Petitioners assert that Respondent's reading of § 46 could allow for en banc courts that are too small. Pet. 34. That practical problem can readily be avoided by local rule, as in the First and Third Circuits. *See* note 13 *supra*. But more importantly, this argument misconceives the purpose of § 46(d)'s quorum requirement. Section 46(d) does not regulate the minimum number of judges who must *initially* be empanelled; it merely specifies how many judges must *remain* on the court that has been constituted (under § 46(c)) to decide a case. *Nguyen*, 539 U.S. at 82-83 (quorum re-

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[13] The sole import of the Committee's reservation of the quorum issue is that it allows a Circuit to set its own quorum requirement by local rule, as the First and Third Circuits have done. *See* 1st Cir. R. 35.0(a); 3d Cir. Internal Operating Procs., 9.5.3.

quirement does not set initial size of panels, which must always have three judges; it merely allows "'disposition by a panel of two judges in the event that one member of a three-judge panel to which the appeal is assigned becomes unable to participate'"). For example, the first panel assigned to hear this appeal lost its quorum in part because a district judge assigned to sit had a personal emergency arise shortly before argument. *See* note 1 *supra*. If half of the en banc Court empanelled to decide this case under § 46(c) likewise became absent, then a quorum would be lost under § 46(d).

In short, the eight active, nonrecused judges are all of the "circuit judges in regular active service" under § 46(c), and thus a majority of those judges—a quorum under § 46(d)—is five. Because a quorum remains available, Petitioners cannot be entitled to the specific relief they request, *viz.*, a return to the three-judge panel.

2. Petitioners Have Failed to Show That an Active Judge Could Not Be Designated From Another Circuit

Petitioners also argue that any lack of a quorum could not be cured by designating a judge to serve from another circuit. Pet. 33. This argument ignores the statutory text.

Federal law provides that the Chief Justice "may, in the public interest, designate and assign temporarily any circuit judge *to act as circuit judge in another circuit* upon request by the chief judge or circuit justice of such circuit." 28 U.S.C. § 291(a) (emphasis added). Except for certain administrative

tasks (such as hiring decisions or managing funds), a circuit judge so designated has "*all* the powers of a judge of the court, circuit or district to which he is designated and assigned." 28 U.S.C. § 296 (emphasis added). That language plainly includes the ability to decide the merits of an en banc rehearing.

This conclusion is confirmed by the language of 28 U.S.C. § 46(c). That section expressly limits eligibility to vote on *whether* to rehear a case en banc to the "circuit judges *of the circuit* who are in regular active service." *Id.* (emphasis added); *United States v. Nixon*, 827 F.2d 1019, 1022 (5th Cir. 1987) (judges of other circuits may not be designated to vote on whether to grant rehearing en banc). But in describing the judges who may *decide* the merits of an en banc case, § 46(c) omits the phrase "of the circuit" and instead provides that (except for senior judges authorized to serve in the limited circumstances set forth in § 46(c)), the en banc court that will decide a case "shall consist of all circuit judges in regular active service." 28 U.S.C. § 46(c). The omission of the phrase "of the circuit" means that an active circuit judge *of another circuit* who has been designated to act as a circuit judge of the Fifth Circuit may serve on an en banc court that will decide a case.[14]

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[14] The omission of the phrase "of the circuit" in the current statute is especially significant because it appeared in an earlier version of § 46(c), and this Court had specifically relied on that phrase to hold that only active judges of "the circuit involved" may decide a case en banc. *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 685, 688 (1960) (construing prior version of § 46(c), which stated that a "court in banc shall consist of all active circuit judges *of the circuit*") (emphasis added). Given the weight that the Court had placed on this phrase, its later omission invokes the settled canon that "a change in language

The distinction thus drawn by § 46(c) on this score makes perfect sense. The decision "*whether to rehear* a case in banc ... is essentially a policy decision of judicial administration," *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 627 (1974), and it is therefore reasonable to confine that decision to the "circuit judges of the circuit who are in regular active service," 28 U.S.C. § 46(c). But "voting *on the merits* of an in banc case is quite different," *Moody*, 417 U.S. at 622; once rehearing has been granted, disposition of the case is no longer a matter of local circuit policy, but simply involves the correct determination of the law as applied to the pertinent facts. That same distinction is also reflected in the fact that, while § 46(c) reserves the decision to grant rehearing en banc to all active judges of the circuit, the statute allows large circuits (such as the Fifth and Ninth) to adopt local rules specifying that a much smaller panel of judges may render the actual merits decision. *See* 28 U.S.C. § 46(c); 9th Cir. R. 35-3 (allowing en banc rehearings to be decided by a panel of 11 judges rather than the full complement of 29).[15]

[must] be read, if possible, to have some effect." *American Nat'l Red Cross v. S.G.*, 505 U.S. 247, 263 (1992).

[15] Petitioners contend that designation of an out-of-circuit judge would constitute a "separation of powers" violation, because it would be tantamount to filling the existing vacancy on the Fifth Circuit in a manner that does not comply with the Appointments Clause of the Constitution. Pet. 33. This argument is patently meritless. Any active judge (or judges) of another circuit so designated would, of course, be a current Article III judge appointed in full conformity with the Constitution.

3. Petitioners Have Failed to Show That the Rule of Necessity Is Inapplicable

Finally, there is no merit to Petitioners' assertion that the Rule of Necessity was unavailable here. Pet. 35.

The Rule of Necessity provides that "a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but *must* do so if the case cannot be heard otherwise." *United States v. Will*, 449 U.S. 200, 213 (1980) (emphasis added) (internal quotation marks omitted). Assuming *arguendo* that the en banc Fifth Circuit had no quorum, Petitioners' appeal "cannot be heard otherwise" because under § 46, only the en banc court is authorized to proceed once rehearing is validly granted (as it indisputably was here). *See supra* at 18-20. Petitioners argue that the Rule does not apply because the "three-judge panel ... has jurisdiction and can render a decision," Pet. 35, but that is incorrect for the reasons explained above.

Petitioners also suggest (as they did below) that the Rule of Necessity applies only in "a court of last resort." Pet. 35. This contention is refuted by *United States v. Will*, which noted that the Rule has often been invoked in *lower courts* when a matter otherwise could not be heard. 449 U.S. at 213-24 (collecting cases).

For obvious reasons, Petitioners do not rely on the Fifth Circuit's primary rationale for rejecting application of the Rule of Necessity here, which was that Petitioners had the option of presenting the merits of their appeal to this Court. Pet. App. 4. In any event,

there does not appear to be any authority supporting the view that the Rule of Necessity is unavailable, despite the inability of the lower courts to act, merely because resort may be had to this Court. This novel and impractical view has thus far apparently been urged only in dicta in a dissenting opinion. *Evans v. Stephens*, 387 F.3d 1220, 1240 (11th Cir. 2004) (en banc) (Wilson, J., dissenting).[16]

III. Petitioners Are Not Entitled to a Favorable Exercise of this Court's Discretion

Lastly, to obtain a writ of mandamus, Petitioners must show that an exercise of this Court's discretion in granting mandamus relief is "appropriate under the circumstances." *Cheney*, 542 U.S. at 381. It plainly is not.

Petitioners' rhetoric that this case represents an "egregious breakdown" of "fundamental fairness" and a "travesty," Pet. 12, 14, rings hollow in light of Petitioners' vigorous opposition below to *every* option for allowing the case to proceed *except* for the one option that would give them a predetermined favorable outcome. *See supra* at 9-12. Petitioners' all-or-nothing approach in the court of appeals may have made tac-

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[16] The Fifth Circuit also expressed the concern that there is no "method to select one particular judge" whose recusal would be set aside by the Rule of Necessity. Pet. App. 4. This overlooks the long-established precedent of the Judicial Panel on Multidistrict Litigation, which in similar circumstances regularly invokes the Rule to permit *all* judges with the same ground of disqualification (typically, stock ownership) to participate, even if only one judge is needed to make a quorum. *In re Wireless Tel. Radio Frequency Emissions Prods. Liability Litig.*, 170 F. Supp. 2d 1356, 1358 n.4 (J.P.M.L. 2001).

tical sense to them at the time. But having taken that approach, Petitioners are in a poor position to complain about any resulting inability to obtain a merits disposition of their appeal.

Moreover, despite Petitioners' contention that the Fifth Circuit unfairly deprived them of their "statutory right to an appeal," Pet. 25, Petitioners failed to pursue the most evident option they had to obtain a merits disposition of their appeal—the filing of a certiorari petition that presented this Court with the merits. At the very least, Petitioners could have filed a petition that raised both the quorum issues and the merits issues. Petitioners' course of action cannot have been an oversight, because the Fifth Circuit reminded the parties of their ability to seek review in this Court, Pet. App. 6, and Petitioners themselves acknowledged that option below. *See supra* at 13.

In view of Petitioners' litigation choices, this case is plainly not among those exceptionally rare cases that warrant an exercise of this Court's discretion to grant mandamus relief.[17]

CONCLUSION

The petition for a writ of mandamus should be denied.

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[17] Moreover, even if the mandamus Petition could be construed, against its terms, as a request for a writ of certiorari on the quorum issues, certiorari review of those issues would be equally unwarranted for the reasons explained above.

Respectfully submitted,
November 2010

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Supreme Court, U.S.
FILED
DEC 14 2010
OFFICE OF THE CLERK

No. 10-294

In The Supreme Court of the United States

IN RE: NED COMER; BRENDA COMER; ERIC HAYGOOD; BRENDA HAYGOOD; LARRY HUNTER; SANDRA L. HUNTER; MITCHELL KISIELWESKI; JOHANNA KISIELWESKI; ELLIOTT ROUMAIN; ROSEMARY ROUMAIN; JUDY OLSON AND DAVID LAIN,

Petitioners.

On Petition For A Writ Of Mandamus To The United States Court Of Appeals For The Fifth Circuit

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INTRODUCTION

Do Petitioners have a clear right, secured by 28 U.S.C. §§ 46 and 1291, to have an appeal of a district court's final decision "heard and determined" by a court of appeals? The five judges below, ostensibly acting as the Fifth Circuit's "internal authority," effectively interpreted 28 U.S.C. § 46(c) to mean that an appeal shall be "heard and determined" either by (1) a panel, (2) an en banc court, or (3) no one. That interpretation raises constitutional problems.

Respondents sidestep these problems with several sophistic objections. Respondents concede that after the en banc court lost its quorum, the Fifth Circuit had options other than total dismissal that would have allowed Petitioners' appeal to be "heard and determined." But Respondents argue that dismissal was proper anyway. Respondents' arguments rely on logical errors and are plainly incorrect.

ARGUMENT

I. If the Fifth Circuit should have fulfilled its duty in some alternate way, then mandamus is still proper.

The parties do not dispute that Petitioners have a statutory right to an appeal. Instead, in briefing to the Fifth Circuit and to this Court, they have disagreed about the proper procedure once the circuit court lost its en banc quorum. Respondents' opposition to mandamus now raises a brand new, and

plainly illogical, argument. Respondents' new argument is this: if any procedure suggested by Respondents in its briefing to the Fifth Circuit was a *correct* procedure for deciding the appeal after a quorum was lost, then the Fifth Circuit was entitled to ignore all suggestions, including Respondents' allegedly *correct* procedure, and to dismiss the appeal without a determination, merely because Petitioners advocated a *different* procedure.

If the Fifth Circuit can choose some other method to hear and decide the appeal, then it must do so. Instead, the Fifth Circuit dropped the appeal altogether. Respondents quibble with Petitioners about the best remedy, but present no cogent argument that the Fifth Circuit ever heard and determined the appeal as required under the law. Thus mandamus is proper even if Respondents can suggest viable alternate remedies.

A. Petitioners did not dictate the Fifth Circuit's decision.

Respondents argue that Petitioners, by opposing Respondents' arguments, forced the five judges to dismiss the appeal. Accordingly, they argue, Petitioners should not be allowed to seek mandamus now:

> "Although Petitioners wrongly complain of an 'egregious breakdown of regular procedure,' they fail to recognize that they shaped that procedure by actively opposing every

> option Respondents suggested for allowing the appeal to proceed en banc."[1]

But *Respondents* also advocated zealously against every option *Petitioners* presented. The courts are not held captive when parties do not agree on a procedural issue. The courts are charged with resolving conflicts between parties. If party agreement were a prerequisite for an appellate court ruling, an appellant's right to appeal would be defeated unless he acquiesced to every procedural argument put forward by the appellee.

The Fifth Circuit, not the litigants, was responsible for making this decision. The five judges abdicated the circuit court's responsibility when they *sua sponte* dismissed the entire appeal. Only this Court, not Petitioners, is in any position to order circuit court judges to take any particular action to correct this mistake.

B. The rule of necessity applies only where extraordinary action is required to provide a necessary hearing.

Respondents argue that the rule of necessity can apply to lower courts and should apply in this case. However, Respondents erroneously conclude that the rule of necessity should apply to force a *discretionary* en banc rehearing.

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[1] *See* Brief in Opposition at 2.

To the extent that the rule of necessity applies in this case, it merely requires that the Fifth Circuit decide the appeal. Under 28 U.S.C. §§ 46 and 1291, *either* a panel *or* an en banc must hear and decide Petitioners' appeal, and usually cases are decided by panels only. That is exactly why the Rules of Appellate Procedure provide for senior judges, judges from other circuits, or district court judges to participate on appellate *panels* when *necessary*. It makes no sense to apply the "rule of necessity" doctrine to take extraordinary measures to force a *discretionary* en banc rehearing where the court lacks a quorum, when the properly constituted panel can simply rehear the case. Respondents inconsistently argue that the Fifth Circuit must apply the rule of necessity to complete the discretionary en banc rehearing, yet did not err in dismissing the entire appeal.

II. A quorum is a quorum, and not something less.

Respondents' argument that the quorum requirement in 28 U.S.C. § 46(c)-(d) can be read to allow less than half of the current active circuit judges to act as an en banc court is also illogical. More specifically, Respondents believe that the Fifth Circuit should interpret the quorum requirement in 28 U.S.C. § 46(c)-(d) to include specific language that was amended into Federal Rule of Appellate Procedure 35 in 2005. Respondents had originally supported this argument before the Fifth Circuit by analogizing to the National Labor Relations Board

("NLRB"), but the Fifth Circuit rejected these arguments. This Court should also reject them.

A. Respondents' reading would nullify the 28 U.S.C. § 46(c)-(d) quorum requirement.

First, the contested language simply is not found in 28 U.S.C. § 46(c)-(d), and courts should not add language into statutes that Congress has not chosen to include. Second, the 2005 Advisory Committee specifically negated this argument in their notes to Rule 35: "[t]he amendment to Rule 35(a) is not meant to alter or affect the quorum requirement of 28 U.S.C. § 46(d)." Third, this Court recently ruled in *New Process Steel, L.P. v. N.L.R.B.*[2] that the NLRB was wrong to ignore Congress's quorum requirement. Both the majority and the dissent in *New Process Steel* expressed the importance of following the 28 U.S.C. § 46 quorum statute as written by Congress.

Under Respondents' reading, the quorum requirement would be void. A vote of the majority of active judges who are not disqualified would be sufficient to grant en banc rehearing, and there would be no reason to even consider how many judges were able to participate in that vote. In other words, the courts would be required to comply *only* with Rule 35 and could simply ignore 28 U.S.C. § 46(c)-(d). This

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[2] 130 S.Ct. 2635 (2010).

would defeat the purposes of both 28 U.S.C. § 46(c)-(d) and the 2005 amendment to Rule 35.

B. Respondents' reading would also defeat the purpose of amending Rule of Appellate Procedure 35 in 2005.

Before the 2005 amendment, some circuits required an "absolute majority" of the active judges to *positively vote* for rehearing. Thus a disqualification essentially counted as a negative vote. In other words, if there are sixteen active judges in a circuit, and seven are disqualified, all nine non-disqualified judges must positively vote for rehearing en banc. Amending the language in Rule 35 resolved a circuit split and clarified that, in the example above, a positive vote of five of the nine participating judges would be sufficient. But this amendment did not do away with the quorum requirement that at least nine of the sixteen judges must be available to participate in the en banc court. In fact, doing so would counteract one of the very reasons that Rule 35 was amended:

> "Second, the absolute majority approach can leave the en banc court helpless to overturn a panel decision with which almost all of the circuit's active judges disagree. For example, in a case in which 5 of a circuit's 12 active judges are disqualified, the case cannot be heard en banc even if 6 of the 7 non-disqualified judges strongly disagree with the panel opinion. This permits one active

> judge – perhaps sitting on a panel with a visiting judge – effectively to control circuit precedent, even over the objection of all of his or her colleagues."[3]

The purpose here is to allow the majority of active judges to participate in rehearing a case and determining what the law will be in that circuit, and to allow a majority vote *of that group* to join in the order to grant en banc rehearing and in the en banc decision. This purpose can only be realized if the quorum requirement remains intact. Under Respondents' reading, if three judges on a panel were the only ones not disqualified, they could vote for en banc rehearing and affirm their own panel decision, giving it en banc precedential authority. This is not entirely farfetched, given the broad effects some current multiparty lawsuits are already having with respect to district court recusals. The quorum requirement is necessary to give proper effect to both Rule 35 and 28 U.S.C. § 46.

C. Mandamus is proper even if circuit courts can ignore the quorum requirement.

The five judges below simply lacked a quorum, and that also means that they lacked authority to dismiss the appeal, thus mandamus is proper because the five judges exceeded their authority. However,

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[3] Fed. R. App. P. 35, 2005 Advisory Committee Notes.

even if Respondents' reading were correct, then mandamus would *still* be proper. In that case, the eight unrecused judges should have ignored the quorum requirement, and issued an "en banc" decision on the appeal. Instead of either of these two outcomes, the five judges ruled that they lacked any authority to act and then dismissed the appeal.

III. Local rules and judicial convention cannot supersede statutes.

The argument above – that courts can reword a federal statute to include language from a procedural rule – demonstrates a larger problem in Respondents' general logic. Respondents argue that the five judges were justified in abrogating statutory duties and rights because they were constrained by their own local rules and judicial convention. But not all laws and rules have equal authority. Courts must honor first the U.S. Constitution, then U.S. statutes, then rules and regulations, then local rules, and only then judicial convention. Judicial convention, local rules, and even federal rules of procedure provide no excuse for violating statutory rights.

For example, Respondents can find no direct legal support for its idea that the panel irrevocably lost jurisdiction and hence can never reassert authority even if the en banc court's quorum dissipates. Respondents argue that their interpretation of 28 U.S.C.

§ 46(c) would support this theory,[4] yet § 46(c) says no such thing:

> "Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . , unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 . . . "

Restricting "a court or panel" to three judges unless the en banc court hears the case is not the same thing as irrevocably divesting a panel of jurisdiction regardless of whatever happens later. Respondents also cite cases to support their argument that courts have traditionally read § 46(c) to mean that panels lose jurisdiction when an en banc court is convened. But these cases do not contemplate what should happen if the en banc court cannot actually rehear the appeal. Accordingly, they are not instructive here.[5]

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[4] *See* Certain Respondent's Brief in Opposition at 16.

[5] As a brief aside, a careful reading of § 46(c) invites the question in this particular case of how the en banc court could have properly ordered rehearing in the first place where a judge voted in February and then recused herself under "new circumstances" in April. The Court does not need to address this quandary, however, if it rejects Respondents' § 46(c) interpretation, because the problem the April recusal created can be corrected simply by sending the appeal to the properly constituted panel for rehearing.

Respondents' argument that the Fifth Circuit is so bound by its own local rules and traditions that it cannot meet its burden under 28 U.S.C. §§ 46 and 1291 runs contrary to the basic principals underpinning the rule of law in the United States. Even if there were a judicial convention that panels irrevocably relinquish jurisdiction when en banc is ordered, any such tradition must yield if it runs afoul of a statute. When courts follow local procedural rules and judicial conventions to the point of violating the clear language in statutes passed by Congress, this violates the separation of powers. A hierarchy of laws must apply here. Under that hierarchy, a federal statute trumps a local rule just as surely as the Constitution trumps a statute. If Fifth Circuit local rules conflict with federal statutes, the local rules must give way.

IV. Due Process requires drawing a distinction between a decision on a lawsuit's merits, and an appeal's merits.

Respondents contend that there was no due process violation here because some courts have dismissed cases without reaching the merits, or lacked power to act and therefore did not, and that these cases did not violate due process considerations. Their argument erroneously blurs important distinctions.

First, Petitioners have never asked the appellate court to decide the substantive merits of their case. Rather, Petitioners merely ask that the circuit court review the district court's decision on standing.

Second, the Fifth Circuit had jurisdiction over this appeal, and Respondents have not disputed this. Third, Respondents point out that appellate courts sometimes dismiss appeals without decisions in certain situations, such as when a litigant appeals an interlocutory decision or when a case becomes moot.[6] None of those situations apply here.[7] The Fifth Circuit's

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[6] An interesting and potentially relevant case on this issue is *Rangra v. Brown*, 584 F.3d 206 (5th Cir. 2009) (en banc), where elected officials challenged the Texas Open Meetings Act ("TOMA"). A Fifth Circuit panel issued a decision, then the en banc court granted rehearing, but while rehearing was pending a plaintiff left office and the en banc court *sua sponte* dismissed the appeal for mootness without an opinion. The Plaintiffs' appeal was totally dismissed and their panel decision had been automatically vacated by Local Rule 41.3. Nevertheless, *Rangra* now affects other litigants. Similarly situated plaintiffs immediately challenged the same TOMA issues in a new lawsuit, *Asgeirsson v. Abbott*, # 4:09-cv-00059-RAJ (W.D.Tx.). The district court in *Asgeirsson* must now determine how to interpret the panel decision's precedential effect where it was automatically vacated under Local Rule 41.3, yet it is the only pronouncement from the Fifth Circuit on the TOMA challenges. *See* Defs.' Proposed Findings of Fact & Conclusions of Law at 3-6, *Asgeirsson v. Abbott*, # 4:09-cv-00059-RAJ (W.D.Tx. filed 11/19/09) (Rec. Doc. 51); Pls.' Findings of Fact & Conclusions of Law at 2-3, *Asgeirsson v. Abbott*, # 4:09-cv-00059-RAJ (W.D.Tx. filed 11/22/09) (Rec. Doc. 52); Pls.' Brief on the Precedential Value of *Rangra v. Brown*, *Asgeirsson v. Abbott*, # 4:09-cv-00059-RAJ (W.D.Tx. filed 11/15/09) (Rec. Doc. 47).

[7] Respondents rely in vain on moot jurisprudence from the *Chrysler Corp. v. United States* cases. 314 U.S. 583 (1941) & 316 U.S. 556 (1942). In 1944, Congress amended the operative jurisdictional statute at issue in those cases, 15 U.S.C. § 29, thereby directing the courts to uphold quorum requirements yet ensure that parties maintain their rights to an appeal.

dismissal without a decision violated the Petitioner's due process rights.

V. When a circuit court has erred, there is no restriction on this Court's mandamus power.

Respondents imply that because this court rarely grants mandamus petitions, it should deny *this* mandamus petition.[8] This Court infrequently exercises original jurisdiction over mandamus petitions, but this fact neither restricts this Court's authority nor diminishes the importance of the unusual case where a circuit court is the subject of a mandamus request.

As decided in *Marbury v. Madison*,[9] the U.S. Supreme Court should not exercise original jurisdiction over most mandamus proceedings. Even writs of mandamus concerning the Vice President of the United States or district court judges should generally be brought in lower courts rather than in this Court. Furthermore, this Court only rarely needs to correct the circuit courts, because they seldom exercise jurisdiction where they should not or fail to exercise jurisdiction where they should. Additionally, even in the extraordinary case where

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[8] Brief in Opposition at 7, fn. 3.

[9] 5 U.S. (1 Cranch) 137 (1803).

original jurisdiction over a mandamus is arguably proper in this Court, parties infrequently request such relief. But that fact does not evidence some vague restriction on this Court's freedom to assert original jurisdiction when it is properly requested.

While litigants rarely request original mandamus relief from this Court, that fact alone does not dictate whether this Court may exercise power over this mandamus. In this case, only the U.S. Supreme Court is vested with authority to correct the circuit court's errors.

CONCLUSION

Where the appellees and the appellants disagree on a procedural issue, the circuit court cannot just throw up its hands and dismiss the entire appeal. Circuit courts must honor their statutory responsibilities to hear and determine cases. Respondents argue that their ideas about how to proceed were better than Petitioners'. Petitioners still disagree with this argument, because Respondents' solutions rely on logical fallacies and assume that procedural rules are as authoritative as statutes. Even if Respondents' procedural theories were better than Petitioners', mandamus is still proper because the Fifth Circuit dismissed the case instead of following any of these suggestions. Accordingly, Petitioners respectfully request that this Court grant this mandamus and order

the Fifth Circuit to restore Petitioners' appeal to the panel for rehearing and determination.

Respectfully submitted,

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